Overview
Men. Health
Lands Trust
Settlement

2-3-93

provided by Jeff Jesse

PRINCIPLES OF ALTERNATIVE SETTLEMENT

1. The following land will be returned to trust status: Land originally granted to the State under the Alaska Mental Health Enabling Act which (a) has not been conveyed or encumbered by the State or reserved by law from public domain, (b) is subject only to oil and gas leases, coal leases or other leases, timber contracts, mining claims, or material sales, (c) is not necessary to carry out the purposes of an interagency land management agreement, (d) is subject only to a land use or right-of-way permit issued by the Department, and (e) has not been approved or disapproved as a Municipal selection.

This description of land to be returned to the Trust is different than that provided in Sec. 54 of Ch. 66 SLA 1990. It deletes the Haines State Forest and Tanana Valley forest from the list of land returned to the Trust and does not provide for the "replacement" of land.

2. Principles of ownership, management and disposition of the land described in paragraph 1 will remain as embodied in Ch. 66 SLA 1991. This means that the land will be conveyed in fee, including subsurface rights, to the Alaska Mental Health Trust Authority. In the context of this settlement, the ACE intervenors agree that, except for the public notice requirements of AS 38.05.945(b) and (c), management and disposition of this land will be as private land and not be subject to the provisions of AS 38.04 and AS 38.05.

3. The State will make an annual payment equal to six percent (6%) of the unrestricted general revenue of the State during each fiscal year as compensation for land which is not returned to trust status. This money will be allocated to the Mental Health Trust Income Account established by Sec. 11 of Ch. 66 SLA 1991.

4. From the funds allocated to the Mental Health Trust Income Account, including proceeds earned from the management of the land, amounts will be appropriated each year to meet the necessary expenses of a comprehensive mental health program. The responsibilities of the Trust Authority, the Governor, and Legislature in carrying out these obligations, the mechanisms for determining annual expenses, and participation by various advisory boards, and the principles governing use of Trust funds will remain as defined in Ch. 66 SLA 1991.

5. To secure the State's obligation to make annual payments from the unrestricted general revenue of the State each year, land that was granted to the State under the Alaska Mental Health Enabling Act and that is designated by law as a State Park, State Forest, State Game Refuge, State Wildlife Refuge, State Game Sanctuary, State Recreational Area, State Recreational River, State Wilderness Park, State Maritime Park, State Special Management Area, State Public Use Area, Critical Habitat Area, Bald Eagle Preserve, Bison Range, or Moose Range will be pledged as security to the Mental Health Trust.

6. Management of and title to the land described in paragraph 5 will remain with the State and income from the land shall be deposited in the General Fund and considered unrestricted general income of the State. In the event that the State forfeits on its obligation to deposit 6% of unrestricted general income in the Mental Health Trust Income Account, the Trust may elect to foreclose upon the land pledged as security. Any action for foreclosure shall be filed in the Supreme Court which shall retain jurisdiction of all issues related to foreclosure, including the transfer of title, the parcels to be foreclosed, and the laws applicable to management of the foreclosed land.

7. The undersigned support S.B. 469 as introduced, incorporating these changes and repealing certain provisions of Ch. 66 SLA 1991.

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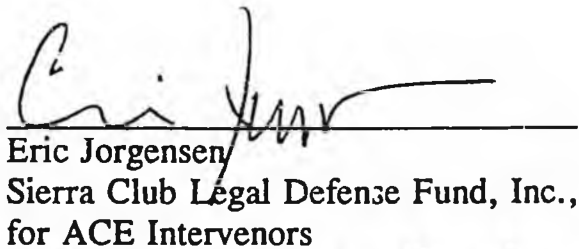
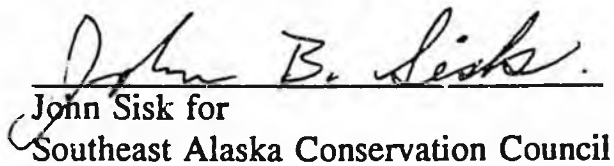
8. Upon the effective date of legislation incorporating this settlement, the ACE intervenors would dismiss their complaint in intervention and support immediate lifting of the injunction and lis pendens, and the objecting plaintiffs would withdraw their opposition to Ch. 66 SLA 1991.

We agree with these principles:



Eric Jorgensen
Sierra Club Legal Defense Fund, Inc.,
for ACE Intervenors



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

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK, and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, AND GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

FIRST AMENDMENT TO SETTLEMENT AGREEMENT

Under the terms of the settlement embodied in Chapter 66, SLA 1991 and the settlement agreement, the State of Alaska will convey certain real property to the Alaska Mental Health Trust Authority. The form for those conveyances are provided in Exhibits

D and E of the Settlement Agreement. The parties to the settlement agreement desire to revise the settlement agreement concerning the applicability of Section 6(i) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 ("Section 6(i)") to Original Trust Lands. It is the parties' intent and interpretation of the Alaska Statehood Act and the Alaska Mental Health Enabling Act that the provisions of Section 6(i) are not applicable to Original Trust Land. The parties recognize that others may argue to the contrary. Consequently, the parties desire to modify the form conveyance documents for Original Trust Land contained in Exhibits D and E to make it clear that the Mental Health Trust Authority will not be required to comply with the provisions of Section 6(i) unless a court determines, as a matter of law, that Section 6(i) applies to Original Trust Land.

The parties hereby amend the Original Trust Land patents and interim conveyances contained in Exhibits D and E of the settlement agreement as follows:

> [insert the underlined language]
>
> Subject to . . . The restrictions imposed by Section 6(i) of the Alaska Statehood Act, Pub. L. 85-508 (72 Stat. 339) <u>to the extent those provisions are determined to apply as a matter of law</u>; and

The parties agree to jointly seek from the court a determination of whether Section 6(i) of the Alaska Statehood Act, Pub. L. 85-508 (72 Stat. 339) applies to Original Trust Land.

The parties also desire to amend Article III, Section 12(g)(iii) to make it clear that, because the trust is compensated in the reconstitution process for diminishment of value associated with mining claims and mining leases, the Mental Health Trust Authority will be bound by the terms applicable to state mining claims and mining leases. The parties hereby amend Article III, Section 12(g)(iii) as follows:

[add the underlined language]

Original Trust Land subject to state administered mining leases or mining claims which the Plaintiffs elect for conveyance to the Trust shall be considered to have returned one-fourth of the comparable value of the mineral estate of such parcel to the Trust <u>and, as provided in Article III, Section 9 of this Settlement Agreement, the Trust Authority shall be bound by and be entitled to enforce the terms applicable to such mining leases and claims, provided however, that prior to the reconstitution of the parcel subject to the mining claim or lease, the mining claimant or mining lessee may negotiate different terms with the Plaintiffs, and if such different terms are negotiated, then the Original Trust Land subject to such negotiated state administered mining leases or mining claims shall be considered to have returned 100 percent of the comparable value of the mineral</u>

estate to the trust.

DATED this 22nd day of June, 1992.

PLAINTIFFS:

DAVID T. WALKER, ESQ., lead counsel, and Attorney for Plaintiffs Vern T. Weiss, father and next friend of Carl Weiss, a minor child, and Earl Hilliker, on behalf of themselves and all others similarly situated

By: ______________________
David T. Walker

JAMES B. GOTTSTEIN, ESQ., Attorney for Intervening Plaintiffs Alaska Mental Health Association, Mary C. Nanuwak, and John Martin on behalf of themselves and all others similarly situated

By: ______________________
James B. Gottstein

JEFFREY L. JESSEE, ESQ., Attorney for Intervening Plaintiffs Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc

By: ______________________
Jeffrey L. Jessee

STATE:

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ATTORNEY GENERAL

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

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, AND GABRIEL MAYOC; and H.L., M.K. and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 CIVIL

SETTLEMENT AGREEMENT

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

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, AND GABRIEL MAYOC; and H.L., M.K. and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 CIVIL

SETTLEMENT AGREEMENT

COME NOW the undersigned parties, by and through their respective counsel, to stipulate and agree as follows:

RECITALS

WHEREAS, the Plaintiffs and the State have been engaged in litigation since 1982 over numerous disputes relating to the requirements of the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709 (1956); and

WHEREAS, in an effort to resolve these disputes without further litigation, the undersigned parties have negotiated a proposed settlement, the basic terms of which were enacted in Chapter 66, Session Laws of Alaska 1991; and

WHEREAS, Section 58 of Chapter 66 provides:

> This Act takes effect upon entry of a final order dismissing Weiss v. State of Alaska, 4FA-82-2208 Civil, and the expiration of any time for appeal. The superior court shall advise the lieutenant governor and the revisor of statutes when the final settlement and order of Weiss v. State of Alaska has been approved;

and

WHEREAS, the undersigned parties seek judicial approval of the terms and conditions of the settlement and if the settlement is approved, seek dismissal of this action;

NOW THEREFORE, IT IS AGREED:

ARTICLE I.
DEFINITIONS.

The following words and phrases shall have the following meanings:

(a) "Beneficiaries" means the beneficiaries of the trust created by Section 202 of the Enabling Act and comprise the members of the class represented by the Plaintiffs in this litigation.

(b) "Chapter 66" means Chapter 66, Session Laws of Alaska 1991, attached as Exhibit A.

(c) "Collateral of Last Resort" means State land described in Attachment 1 to "Lands Hypothecated to the Mental Health Trust, May 1991," referred to in Section 56(a) of Chapter 66, and more particularly described in pages _________ of Exhibit B hereto.

(d) "Commissioner" means the Commissioner of the Department of Natural Resources, State of Alaska.

(e) "Enabling Act" means the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709 (1956).

(f) "Encumbered Original Trust Land" means land granted under the Enabling Act and that is subject to a lease, permit, oil and gas lease, mining claim or mining lease, coal lease, easement or right-of-way, timber sale, material sale contract, land sale contract, interagency land management assignment, or some other encumbrance of a similar nature not contained in the grant from the federal government or to which that grant was subject.

(g) "Hazardous Substance" has the same meaning as that term is defined in AS 46.03.826(5), as now enacted or hereafter amended, including any successor statutes to AS 46.03.826(5).

(h) "Hypothecated Lands" means the lands listed in "Lands Hypothecated to the Mental Health Trust, May 1991" referred to in Section 56(a) of Chapter 66, and more particularly described in the attached Exhibit B, that have not been released pursuant to Section 56(c) of Chapter 66 and Article III, Section 21, of this Settlement Agreement.

(i) "Legislatively Designated Areas" has the same meaning as that set out in Section 55(b) of Chapter 66.

(j) "Non-Reconstituted Trust Land" means Original Trust Land, or an interest therein, that will not be conveyed to the Trust under Section 54(1) -- (6) of Chapter 66 and for which an exchange has been or will be completed under Section 54(7) of Chapter 66.

(k) "Original Trust Land" means land granted under the Enabling Act.

(l) "Plaintiffs" means VERN T. WEISS, father and next friend of CARL WEISS, minor child, and EARL HILLIKER, on behalf

of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated, ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; H.L., M.K. and ALASKA ADDICTION REHABILITATION SERVICES; and such other parties as may be formally substituted for or added to the foregoing.

(m) "Proposed Substitute Land" means land that is proposed by either the State or the Plaintiffs for conveyance to the Trust under Sections 54(7) and 55 of Chapter 66 and this Settlement Agreement.

(n) "Reconstituted Trust Land" or "Trust Land" means land that has been conveyed to the Trust Authority under Sections 54 -- 56 of Chapter 66 and Article III, Section 15, of this Settlement Agreement, including Original Trust Land, Substitute Land, or some other real property, and includes improvements or interests therein owned by the Trust.

(o) "Substitute Land" means land other than Original Trust Land that will be conveyed to the Trust Authority under Sections 54(7) and 55 of Chapter 66 .nd this Settlement Agreement in exchange for Non-Reconstituted Trust Land, and incluues improvements or interests therein owned by the State.

(p) "Trust" means the trust created by Section 202 of the Enabling Act, as reconstituted under Chapter 66 and this Settlement Agreement.

(q) "Trust Authority" means the Alaska Mental Health Trust Authority established under Section 26 of Chapter 66 or any

successor entity or person that may subsequently be assigned one or more of the responsibilities of the Trust Authority imposed by Chapter 66 and this Settlement Agreement.

(r) "Trust Corpus" means the principal of the Trust, including both real and personal property and cash assets properly allocated to the Trust Corpus from Trust Receipts.

(s) "Trust Funds" means all cash assets of the Trust, including cash that is part of the Trust Corpus and cash that is Trust Income.

(t) "Trust Income" means Trust Receipts that are not properly allocated to the Trust Corpus.

(u) "Trust Property" means Trust Land, Trust Funds, including Trust Receipts, Trust Income, and Trust Corpus, and all other assets owned by the Trust.

(v) "Trust Receipts" means cash or other liquid assets received from the sale, management, or investment of the Trust's assets.

ARTICLE II.
INCORPORATION OF CHAPTER 66.

The provisions of Chapter 66 are incorporated herein. The parties agree that the provisions of Chapter 66 meet the trust responsibilities and obligations imposed on the State under the Enabling Act. This Settlement Agreement is intended to clarify the manner in which the State and the Plaintiffs are to discharge their responsibilities and obligations set out in Chapter 66 and to provide certain remedies for any breach thereof.

ARTICLE III.
TRUST RECONSTITUTION.

The Trust will be reconstituted in accordance with the provisions of Sections 54 -- 57 of Chapter 66 and this Settlement Agreement. In doing so, the undersigned parties agree as follows:

1. Information Sharing. (a) Each party will provide the other access to all non-confidential files, a copier, and paper as required.

(b) The parties will jointly develop a shared computer-based information system. Information shall be developed by each party in a format allowing exchange and retrieval of the information by each party through the shared computer-based information system.

(c) Except for confidential analyses and confidential information developed in the course of or in anticipation of other litigation, the State and the Plaintiffs shall provide the other party computer-based data in its possession or control concerning parcels of Original Trust Lands, Hypothecated Lands, and other State land, including but not limited to revenue projections and valuations.

(d) Neither party will charge the other for new information developed by that party or for existing computer-based data retrieved or formatted in the course of implementing Chapter 66.

(e) The following information shall be developed by the State, unless the parties agree the Plaintiffs shall develop the information, and provided to the other party:

> Original Trust Lands: Information regarding (1) federal selections, approvals, and patents; (2) the status of title; and (3) encumbrances or conveyances plus, for

Non-Reconstituted Trust Land and Encumbered Original Trust Land subject to Section 54(4) of Chapter 66 or election by the Plaintiffs under Section 54(6) of Chapter 66 and Article III, Section 8 of this Settlement Agreement, (4) value, if already existing; (5) revenue history; (6) revenue projections, if already existing; (7) physical characteristics; (8) natural resource features; (9) current use to the extent existing files contain such information; (10) past use to the extent existing files contain such information; and (11) allowable uses;

Hypothecated Lands: Information regarding (1) federal selections, approvals, and patents; (2) the status of title; and (3) encumbrances or conveyances;

Potential Substitute Land: Information regarding (1) federal selections, approvals, and patents; (2) encumbrances or conveyances; (3) value, if already existing; (4) revenue history; (5) revenue projections, if already existing; (6) physical characteristics; (7) natural resource features; (8) current use to the extent existing files contain such information; (9) past use to the extent existing files contain such information; and (10) allowable use.

(f) Computer-based data, other than as described above, that either party has will be provided to the other party, upon request, in a timely manner subject to payment by the other party of the reasonable job costs associated with the request.

(g) Any dispute under this Section, including (i) whether the utility of the information justifies the expense to develop it, and (ii) whether sufficient information has been developed and provided to the other party, shall be resolved by the court under Section 57 of Chapter 66.

2. <u>Confidential Information.</u> Except for confidential information developed in the course of or in anticipation of other litigation, the information described in Article III, Section 1, to be provided by the parties includes confidential information (but not analyses), but its confidential nature shall

be so stated by the State or Plaintiffs and may only be disclosed to counsel for the State or Plaintiffs, their employees, or consultants, or any combination thereof, or to the court in the event that a dispute is referred to the court pursuant to Section 57 of Chapter 66. To the extent a third party may have a legally protectable interest in keeping the information confidential, the third party shall be informed sufficiently in advance of the possibility of disclosure for the third party to seek to have the disclosure enjoined. The State or Plaintiffs shall advise each other if any confidential information is not to be disclosed under this section and the nature of such data. Counsel for Plaintiffs and their employees and consultants to whom confidential information is disclosed may not further disclose the confidential information (except to the court in the event that a dispute is referred to the court pursuant to Section 57 of Chapter 66 and this Settlement Agreement).

3. Termination of At-Will Interests. Except for rights granted to the State, the State, after consultation with the Plaintiffs and upon their request, shall terminate those third party authorizations or interests in Original Trust Land to be conveyed to the Trust Authority that are, by the terms of the document granting the authorization or interest, terminable will. If Plaintiffs do not request termination, compensation to the Trust will not be required.

4. Reducing Amount of Original Trust Land Used by State Agencies. Original Trust Land or interests therein used by any State agency (Agency) under a lease, permit, interagency land

management agreement, interagency land management transfer, management agreement, management right, or other use granted to the State and not located within a Legislatively Designated Area (except the Tanana Valley State Forest and the Haines State Forest Resource Management Area), is subject to a determination under this Section. Pursuant to this Section, the Commissioner shall determine the smallest practicable tract of land reasonably necessary to support the Agency's use and shall convey the remainder of the parcel to the Trust Authority.

(a) The parcel retained by the Agency may include improved lands and a buffer zone surrounding improved lands as is reasonably necessary for purposes such as safety measures, maintenance, security, erosion control, noise protection and drainage. Parcels containing gravel or other building materials used in direct connection with the State's purpose in using the parcel and not used simply as a source of revenue or services may also be retained by the agency. The extent of the areas retained as a source of materials will be the area disturbed but not depleted as of July 1, 1991.

(b) Unless the Plaintiffs elect to have the land conveyed to the Trust Authority subject to the rights of the Agency under Section 54(6) of Chapter 66 and Article III, Sections 8 and 15, of this Settlement Agreement, the State shall retain full title to the smallest practicable tract as determined hereunder for the Agency, provided, however, if the parcel is used primarily for access, a telecommunications site, electronic, light or visibility clear zones, rights-of-way, or similar uses, an easement may

be reserved in lieu of full title if the Commissioner determines that an easement affords sufficient protection, is customary for the particular use, and would further the objectives of Chapter 66.

(c) If the Commissioner does not have sufficient information to make a determination under this Section, the Commissioner shall issue written notice to any State agency that the Commissioner has reason to believe may be subject to this Section. The written notice shall provide that the information requested be furnished to the Commissioner and the Plaintiffs by the Agency within 45 days from the receipt of the notice. At a minimum, the information provided by the Agency shall include:

(i) the function and scope of the Agency's use of the parcel;

(ii) a legal description of the lands in actual use;

(iii) a list of structures or other alterations to the character of the land and their function, their location on the tract, and date of construction;

(iv) a description of the use and function of any unaltered land;

(v) a list of any rights, interests, or permitted uses that the Agency has granted to others or that have been granted to the Agency by others, along with dates of issuance and expiration and copies of any relevant documents. The Department of Natural Resources shall assist the Agency in determining any rights, interests, or permitted uses that the Department of Natural

Resources has granted to others for the parcel being used by the Agency; and

(vi) if available, site plans, drawings, and annotated aerial photographs delineating the boundaries of the Agency's facilities and locations of areas used.

(d) The Commissioner shall request comments from the Plaintiffs relating to the determination of the smallest practicable tract. The Plaintiffs shall have 30 days to comment commencing from their date of receipt of the Agency's submission.

(e) The Agency has the burden of proof under this Section. The smallest practicable tract determination by the Commissioner shall be based on the information in the case file. The results of the determination shall be incorporated into an appropriate decisional document. The decision of the Commissioner shall be final and not reviewable by the court under Sections 55(h) and 57 of Chapter 66.

5. Conveyances of Unencumbered Land or Land Subject Only to Qualified Encumbrances. When the State and the Plaintiffs agree, or the court resolves a dispute pursuant to Section 57 of Chapter 66, that Original Trust Land is properly categorized as being included in Sections 54(1) -- (5) of Chapter 66, such land shall be conveyed to the Trust Authority pursuant to Article III, Section 15, below.

6. Non-Reconstituted T[illegible] Land Parcels. When the State and the Plaintiffs agree, or the court resolves a dispute pursuant to Section 57 of Chapter 66, that Original Trust Land is properly characterized as:

(i) land in Legislatively Designated Areas, except for the Tanana Valley State Forest and the Haines State Forest Resource Management Area;

(ii) land in which title has been conveyed out of State ownership;

(iii) land selected by a municipality under AS 29.65 or under former AS 29.18.190 -- 29.18.200 and which selection has been approved by the director of the division of lands, Department of Natural Resources on or before the effective date of Chapter 66 (which approvals were enjoined by a preliminary injunction entered on July 9, 1990, and no further approvals may be made without a modification of the preliminary injunction) and has not been mutually agreed by the parties to be returned to the State by a municipality for return to the Trust;

(iv) land subject to contracts of sale (including leases which have been or may be converted to contracts of sale);

(v) land properly entered under homesite, homestead, open to entry, or remote parcel entry programs prior to July 9, 1990;

(vi) land subject to the Chena River Condemnation; or

(vii) land subject to conveyance under land exchange and litigation settlement agreements entered into prior to July 9, 1990,

such land is Non-Reconstituted Trust Land and the parties shall proceed under Section 55 of Chapter 66 to identify Substitute

Land to convey to the Trust under Sections 54(7) and 55 of Chapter 66 and Article III of this Settlement Agreement.

7. Compensation for Encumbrances. (a) The Trust shall not be compensated for encumbrances (i) set forth in Section 54(2) of Chapter 66, or (ii) to which the federal was subject, including, but not limited to, encumbrances granted to the State which do not appear on the conveyance document because of the United States Department of the Interior, Bureau of Land Management's (BLM's) interpretation and administration of the merger of title doctrine.

(b) Except as may otherwise be mutually agreed upon, compensation to the Trust for Encumbered Original Trust Lands conveyed to the Trust Authority, subject to encumbrances under Section 54(4) of Chapter 66, or which the Plaintiffs elect to receive under Section 54(6) of Chapter 66 (other than the encumbrances set forth in Section 54(2) of Chapter 66), shall be determined as follows:

(i) Rights-of-way, except where granted for a fair market lease rate, in which event the Trust shall receive the lease payments and no other compensation shall be due, by conveyance to the Trust of an equal acreage of comparable land in the same vicinity. In the event comparable land can not be located, land of equal value to the acreage subject to the right-of-way shall be conveyed to the Trust.

(ii) Leases, by calculating the leasehold value (the present value of the difference between market rent and con-

tract rent), if any, using a 10% discount rate and conveying Substitute Land to the Trust under Sections 54(7) and 55 of Chapter 66 and Article III of this Settlement Agreement, equal to such leasehold value.

(iii) Land use permits not terminable at will, by conveying Substitute Land to the Trust Authority under Sections 54(7) and 55 of Chapter 66, and Article III of this Settlement Agreement, equal to the leasehold value of the Permit (the present value of the difference between market rent and the contract rent), if any. Leasehold value will be determined by using a discount rate of 10%, and annual rental rate of 8% of the fair market value of the land estate, for the length of the permit.

(iv) Subdivision roads (defined as internal roads within a tract of Original Trust Lands created during the subdivision process to provide access to lots within the tract of Original Trust Land), if less than all of the lots in the subdivision are conveyed to the Trust by conveying Substitute Land as provided in Subsection (i). If all of the lots in such a subdivision are conveyed to the Trust, no compensation shall be due.

(v) Material sales by payment to the Trust of all payments due under the material sale beginning July 1, 1991.

(vi) Other encumbrances, by conveying Substitute Land to the Trust Authority as provided in Sections 54(7) and 55 of Chapter 66 and Article III of this Settlement Agreement as provided in subsection (i), provided, however, that

nothing herein prevents the parties from agreeing to other procedures for determining how to compensate the Trust for such other encumbrances, similar to those procedures provided in (i) - (v) of this Subsection.

8. Encumbered Land Election. When the State and the Plaintiffs agree, or the court resolves a dispute pursuant to Section 57 of Chapter 66, that Original Trust Land is properly categorized as land subject to acceptance by Plaintiffs under Section 54(6) of Chapter 66, and after the amount of compensation has been determined pursuant to Article III, Section 7 of this Settlement Agreement, the Plaintiffs shall elect either conveyance to the Trust under Section 54(6) of Chapter 66 any such Encumbered Original Trust Land and have the Trust receive the compensation set forth in Article III, Section 7, or to have the Encumbered Original Trust Land not conveyed to the Trust and have it receive Substitute Land in exchange pursuant to Section 55 of Chapter 66 and Article III of this Settlement Agreement.

9. Encumbered Land Remains Subject to Encumbrances. Encumbered Original Trust Land that is conveyed to the Trust under Chapter 66 and this Settlement Agreement shall be conveyed subject to the terms of any valid existing encumbrance and the Trust Authority shall abide by and be entitled to enforce the terms of such encumbrance, except where the Trust is compensated with land under Article III, Subsection 7 (b) (i) of this Settlement Agreement, in which case the State may elect to retain the right to enforce the terms of such encumbrances. For the purpose of this

Section, possible inconsistency with the Enabling Act is not grounds to challenge the validity of an encumbrance.

10. Nomination of Potential Substitute Land. When Plaintiffs determine that they are interested in reviewing certain State owned land for possible exchange they shall preliminarily nominate such land as potential Substitute Land and the information set forth in Article III, Section 1, pertaining to potential Substitute Land shall be developed and provided to both parties.

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

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

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

12. Developing Exchanges.

(a) Joint Effort. The State and the Plaintiffs shall work together to develop exchange proposals that meet the requirements of Section 55 of Chapter 66, including mutually developing systems to efficiently handle the large number of transactions involved. In the event that the State and Plaintiffs reach an impasse on an exchange or exchanges, the differences shall be presented to the court for resolution under Sections 55(h) and 57 of Chapter 66.

(b) Parcels. Original Trust Lands parcels are the parcels identified under Chapter 48, SLA 1987, except (i) where different parceling is necessary or desirable to accomplish the reconstitution, or (ii) for purposes of valuation. For purposes of valuation, large parcels shall be reparceled into the size they are most likely to have been or would be sold in the marketplace. These parcels shall be no less than 40 acres nor larger than 160 acres in size in areas that are generally satisfactory for development, except where parcels smaller in size than 40 acres are legally conveyable. In the interpretation of this principle, "areas generally satisfactory for development" means areas having generally less than a 15% slope and no higher in elevation than the locally defined contour of tree line, with areas above this elevation being parceled as a separate tract or tracts. Areas classified as a 40 acre size shall be those tracts with greater accessibility to roads, water or airstrips; less adverse slopes;

and more favorable development characteristics (soils, slope, drainage), while 160 acre parcels shall be those in a remote location with less desirable development characteristics. Settlement development trends and local land regulations (zoning) shall also be considered in the classification of parcels into 40 and 160 acre sizes. This classification process shall be conducted jointly by the State and Plaintiffs and the parceling results shall be mutually agreed to by the parties. These procedures shall also apply to Proposed Substitute Land.

(c) Aggregation Allowed. Subject to the requirements of subsections 55(d) and (e) of Chapter 66, either individual parcels or groups of parcels may be exchanged.

(d) Equal Fair Market Value Always Required Even When Comparable Land Not Identified. The parties agree that the Trust will be reconstituted only with Substitute Land of equal fair market value compared to Non-Reconstituted Trust Land or to encumbrances on Original Trust Lands. When considering specific exchanges, Substitute Land must be exchanged for Non-Reconstituted Trust Lands and encumbrances on Original Trust Lands on the basis of equal fair market value, notwithstanding that comparable Proposed Substitute Land under Section 55(d) of Chapter 66 has not been identified.

(e) Revenue Generating Capacity of Substitute Land. When considering specific exchanges, if there is no Proposed Substitute Land comparable to the Non-Reconstituted Trust Lands for which the Proposed Substitute Land is to be compensation under Section 55 of Chapter 66, other land owned by the State may be

proposed as Substitute Land, but only so long as its revenue generating history and/or potential is comparable to the revenue generating history and/or potential of the Non-Reconstituted Trust Land.

(f) Valuation of Parcels -- General Rules. In determining equal fair market value under Chapter 66, valuations of Non-Reconstituted Trust Land shall be based upon the fair market value of the parcel or parcels without regard to encumbrances, but with regard to physical access. Valuations of Legislatively Designated Non-Reconstituted Trust Land may consider the special and/or unique value which caused its recognition for the legislatively designated use, but may not be reduced because of the restrictions on use resulting from the legislative designation. Valuations of Proposed Substitute Lands shall reflect any change in value resulting from the existence of an encumbrance. Valuations of both Non-Reconstituted Trust Lands and proposed Substitute Land shall include the contributory value of site improvements, such as site preparation (i.e., excavation, clearing, grading, etc.), fill, building pads, roadbeds, runway base, wells, and septic systems. For Non-Reconstituted Trust Land, the value of other improvements such as paving, pipelines, electrical transmission or distribution lines, and buildings shall not be included. For Substitute Land, the value of other improvements such as paving, pipelines, electrical transmission or distribution lines, and buildings shall be included where the Trust Authority is to take title to the improvements. Parcels shall be assembled and considered together where appropriate.

(g) Exchanges of the Mineral Estate of Non-Reconstituted Trust Land.

(i) De Minimus Mineral Estate Values. When developing exchange proposals for Non-Reconstituted Trust Land, if the parties agree that there is no indication that the mineral estate is of particular value, exchanges shall be developed without formally determining the value of the mineral estates of the Non-Reconstituted Trust Land and the proposed Substitute Land. In determining whether there is no indication that the mineral estate is of particular value, the parties shall consider whether the land was selected for mineral values, whether there have been any mineral closing orders applying to such land and the reasons for such closures, whether the geologic terrane is favorable for mineral value, and other available information.

(ii) Mineral Exchanges. Exchanges of the mineral estate of Non-Reconstituted Trust Land where the land is not considered to have a de minimus mineral value under Subsection (g) (i) shall be accomplished as provided in Sections 55 (c) -- (e) of Chapter 66 employing the following criteria and as specified in Exhibit C:

A. geologic characteristics;

B. mineral characteristics;

C. mineral economic valuation estimates using practical methods considering available data; and

D. differences in the states of knowledge of the mineral endowment of the respective lands.

(iii) Original Trust Land subject to state administered mining leases or mining claims which the Plaintiffs elect for conveyance to the Trust shall be considered to have returned one-fourth of the comparable value of the mineral estate of such parcel to the Trust.

(iv) The economic impact of the existence of mineral encumbrances on Substitute Lands shall be considered prior to comparison with Non-Reconstituted Trust Lands and exchanges shall then be conducted as provided in Subsection (g) (ii) without further adjustment under Subsection (g) (iii).

(v) The exchange process will be based upon comparability as near as practicable. Differences in comparable character shall be resolved through selecting Substitute Land with different geologic and mineral characteristics as agreed to by the parties. Differences in states of knowledge shall be resolved through negotiation between the parties.

(vi) If agreement between both parties regarding the evaluation process or procedures cannot be attained, it shall be subject to review by a Technical Review Committee (TRC). The TRC will consist of five members, two selected by the State, two by the Plaintiffs, and one by the four so selected, consisting of recognized experts from industry, government, and academia.

Rather than selecting a TRC, both parties may elect to use the Alaska Minerals Commission for this purpose. After review by the TRC or Alaska Minerals Commission, any remaining dispute shall be resolved by the court under Section 57 of Chapter 66.

(h) Date of Valuation. The date of all valuations shall be the date of this Settlement Agreement.

(i) Severed Estate Permissible. If the land estate of Original Trust Land is in a category that prevents its conveyance to the Trust, but the mineral estate is in a category that allows for its conveyance to the Trust, the parties may agree to have the mineral estate conveyed to the Trust and the Trust compensated for the land estate not returned as provided in Section 55 of Chapter 66 and Article III of this Settlement Agreement. Unless otherwise mutually agreed to by the parties, all other conveyances under Chapter 66 and this Settlement Agreement shall include both the land and mineral estates.

13. Hazardous Substances. (a) In the event the presence of a Hazardous Substance on a parcel of Original Trust Land or Proposed Substitute Land is known prior to the conveyance of such land to the Trust Authority, then the State,

(i) in its sole discretion, shall elect to either (A) clean up the parcel to a standard mutually agreeable to the State and Plaintiffs, or (B) not convey the parcel and compensate the Trust with Substitute Land equal in fair market value to the parcel without the Hazardous Sub-

stance, as provided in Section 55 of Chapter 66 and Article III of this Settlement Agreement; or

(ii) if mutually acceptable to the State and Plaintiffs, need not clean up the parcel and convey the parcel subject to an indemnification from the State in favor of the Trust for any claim or loss resulting from the presence of Hazardous Substances.

(b) If a Hazardous Substance came to be located on Reconstituted Trust Land prior to its conveyance to the Trust Authority and is discovered after it has been conveyed to the Trust Authority, the State shall

(i) be responsible to the Trust Authority for response actions that are consistent with the National Contingency Plan, 40 CFR Part 300, and in accordance with all applicable provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 et seq., AS 46.03.822, and all other similar environmental statutes or regulations as may now be or subsequently become applicable; and

(ii) indemnify the Trust Authority for other claims, losses, judgments, damages, and costs (including attorney and consultant fees) resulting from the presence of a Hazardous Substance which came to be located on Reconstituted Trust Land prior to its conveyance to the Trust Authority,

PROVIDED, HOWEVER, that an environmental site assessment, appropriate in scope to the location and present and past use of

the land, and acceptable to the Plaintiffs or Trust Authority (as appropriate) and the State, shall be conducted as follows:

A. at the sole discretion and expense of the State, prior to the conveyance of land to the Trust Authority; or

B. after the conveyance of land to the Trust Authority and prior the (A) disposal of such land, (B) disposal of an interest in such land, or (C) authorization of any use of such land with significant potential for the release of Hazardous Substances, whichever comes first, one-half of the cost for such investigation being borne by the State.

All reports and other information either party receives as a result of any such environmental investigations shall be provided to the other party. The Department of Environmental Conservation and the Commissioner shall be notified immediately of the known or suspected presence of Hazardous Substances. Except as specifically provided in this Section, nothing in this Section shall prohibit or otherwise limit the Trust Authority's or the State's right to assert any claims or defenses available to it under the law.

14. Notice of Proposed Exchange. When the State and Plaintiffs have agreed upon an exchange, or prior to submitting a proposed exchange to the court under Section 55(h) of Chapter 66, the State shall provide notice of the proposed exchange in accordance with AS 38.05.945(b) and (c) and furnish a copy thereof to Plaintiffs. The notice shall identify the Proposed Substitute

Land and the Non-Reconstituted Trust Land, and state that an exchange is proposed under Section 54(7) of Chapter 66. Either party may modify its position on a proposed exchange as a result of the response to the public notice.

15. Convevances of Land to Reconstitute the Trust.

(a) Land to be conveyed to the Trust Authority under Sections 54 and 55 of Chapter 66 and this Settlement Agreement shall be granted to the "Alaska Mental Health Trust Authority, trustee," by patent, in the form attached hereto as Exhibit D, with the status of title agreed to by the parties or resolved by the court under Section 57 of Chapter 66. The parties shall jointly develop procedures for timely acceptance or rejection of proposed conveyance documents and court review. If any such Reconstituted Trust Land requires survey prior to issuance of a patent, the State shall first convey such land by issuing a "Mental Health Trust Interim Conveyance," in the form attached hereto as Exhibit E, and then have the land surveyed and issue the patent upon completion of the survey. As a general rule, the conveyance document shall convey land by township and each conveyance document shall contain only one category of land (Original Trust Land or Substitute Land), one type of estate to be conveyed (land and mineral, land only or mineral only), and segregate the surveyed and unsurveyed portions.

(b) The State, at its expense, may defend the status of title as set forth in Subsection (a) of this Section. For Reconstituted Original Trust Land, if the status of title, as of the date of the conveyance document, with respect to interests creat-

ed by the State subsequent to the State receiving management authority over such land whether by conveyance of such land from the federal government, by approval for conveyance or patent, or otherwise, is different than as set forth in Subsection (a) of this Section, the State shall compensate the Trust for the difference as provided in Article III, Section 7 of this Settlement Agreement. For Substitute Land, if the status of title as of the date of the conveyance document is different than as set forth in Subsection (a) of this Section, the State shall compensate the Trust for the difference as provided in Article III, Section 7 of this Settlement Agreement. The remedies provided in this Subsection are exclusive.

16. Surveys of Reconstituted Trust Land. Parcels of Reconstituted Trust Land requiring survey shall be surveyed by the State at its expense in the order specified by the Trust Authority and completed as soon as practicable. Plaintiffs and the State agree to jointly develop and propose to the Legislature a survey budget for each fiscal year, provided, however, nothing herein shall be deemed to mean that the State is not required to complete the surveys as soon as practicable. In order to convey land to the Trust, the parties agree that surveys appropriate to the type of land conveyed shall be accomplished, considering future Trust management and the potential uses the land, and satisfy local platting requirements.

17. Releases of Non-Reconstituted Trust Lands. For Non-Reconstituted Trust Lands that have been exchanged for Substitute Land, the Plaintiffs and the Trust Authority will, if requested,

assist in the preparation of and will execute releases of interest from "the Alaska Mental Health Trust Authority and Beneficiaries of the trust created by Section 202(e) of the Alaska Mental Health Enabling Act of 1956, PL. 84-830, 70 Stat. 709 (1956), represented by the named plaintiffs in Weiss et. al. v. State, 4FA 82-2208 Civ.," to the "State of Alaska," in the form attached hereto as Exhibit F, at the time the patent or interim conveyance of the Substitute Land is issued.

18. Conveyances Recorded at State Expense. The patents, interim conveyances, and releases of interest shall be recorded at the State's expense in the recording district in which the land is located, with the original interim conveyances and patents returned to the Trust Authority and releases of interest returned to the State.

19. Exchanges Not Re-opened As a Result of Acreage Adjustments by BLM. The parties acknowledge that (1) many of the Original Trust Lands are lands that have been selected and approved for conveyance but have not been patented because they are unsurveyed, (2) it may be some time before the BLM surveys and issues patents for those lands, and (3) the acreages of some parcels as patented may vary from the acreages of those parcels shown in the selections approved for conveyance. The parties agree that no Chapter 66 exchange shall be adjusted if a later BLM patent of a parcel of Non-Reconstituted Trust Land shows an acreage figure different from that shown on the land records employed during the process of reconstituting the Trust.

20. <u>Law Applicable to Reconstitution</u>. (a) In reconstituting the Trust, it is the parties' intent that:

(i) only the provisions of Sections 54 -- 57 of Chapter 66 and the provisions of this Settlement Agreement apply;

(ii) except for (A) AS 38.05.945(b) and (c), and (B) as otherwise specifically provided herein, the provisions of State law that otherwise apply to the conveyance of state lands do not apply to the conveyance of lands to the Trust under this Settlement Agreement, provided, however, that access to or along navigable or public waters may be reserved from conveyances of Substitute Land to the Trust (with the value of the Substitute Land taking into account such reservations); and

(iii) lands are not required to be in a disposal classification in order to be conveyed to the Trust.

(b) In the event that claims are made challenging the validity of (i) -- (iii) of Subsection (a), the State and the Plaintiffs will defend the parties' right to proceed in accordance with (i) -- (iii) of Subsection (a).

(c) If a final order is entered prohibiting the parties from continuing to honor the terms of (i), (ii), or (iii) of Subsection (a), the parties shall have 60 days to arrive at a mutually agreeable way to reconstitute the Trust in compliance with such final order. In the event the parties are unable to arrive at such an agreement, (1) if the final order requires a contrary application of AS 38.04 or AS 38.05, either party has the right to terminate this Settlement Agreement; or (2) if the

final order requires the application of any other State law, the parties may apply to the court for appropriate relief.

21. Release from Hypothecation. As the Trust is reconstituted by Substitute Land being conveyed to the Trust by the interim conveyances or patents specified in Article III, Section 15 above, the State may request that Plaintiffs execute a release from hypothecation of specified parcels of Hypothecated Lands from the Hypothecated Lands List in the form attached hereto as Exhibit G, provided, however, that the lands remaining on the Hypothecated Lands List shall at all times be sufficient to provide security for the remaining exchanges to be accomplished under Section 55 of Chapter 66 and this Settlement Agreement. In the event of a dispute between the parties with respect to the release of lands from the Hypothecated Lands List, the dispute shall be resolved by the court as provided in Sections 55 -- 57 of Chapter 66.

22. Notice When Reconstitution Complete. Upon completing reconstitution of the Trust pursuant to Sections 54 -- 57 of Chapter 66 and this Settlement Agreement, the Plaintiffs and the State shall jointly send written notice thereof to the Governor, the President of the Senate, the Speaker of the House, the Revisor of Statutes, the Commissioner of the Department of Health and Social Services, the Attorney General, the Commissioner, the Director of the Division of Mental Health and Developmental Disabilities, the Trust Authority, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, the Advisory Board on Alcoholism and Drug Abuse, the Older Alaskans

Commission, and the Alaska Native Health Board. Any disagreement as to whether reconstitution of the Trust has been completed shall be determined by the court under Section 57 of Chapter 66.

23. Remedy in Event Conveyance of Mineral Estate Violates Section 6(i). The State and the Plaintiffs intend that unless specifically excluded, the Mineral Estate as well as Land Estate be conveyed to the Trust as part of the Trust reconstitution process (including Hypothecated Lands acquired by foreclosure). In the event that it is finally held that including the mineral estate in conveyances of Original Trust Land or Substitute Land to the Trust under Chapter 66 and this Settlement Agreement is a violation of Section 6(i) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, or is otherwise categorically prohibited, the parties shall have 60 days to arrive at a mutually agreeable way to resolve the issue. If no such agreement is reached, this Settlement Agreement shall be terminated.

24. Remedy in Event State Does Not Allocate Required Percentage of Unrestricted General Fund. AS 37.14.036(c), as enacted in Section 11 of Chapter 66, provides that in each of the following State fiscal years:

> [T]he commissioner of revenue shall allocate from the general fund of the state to the mental health trust income account in the general fund an amount equal to the percent of unrestricted revenue of the state specified for that fiscal year:

FISCAL YEAR ENDING	PERCENT OF UNRESTRICTED STATE REVENUE
June 30, 1992	six percent
June 30, 1993	six percent
June 30, 1994	five percent
June 30, 1995	five percent
June 30, 1996	four percent

June 30, 1997	four percent
June 30, 1998	three percent
June 30, 1999	three percent
June 30, 2000	two percent
June 30, 2001	two percent
June 30, 2002	one percent
June 30, 2003	one percent

The provisions of AS 37.14.036(c) are of material importance to the Plaintiffs in the resolution of this suit. The parties agree that if, in any fiscal year, the commissioner of revenue, for any reason, fails to allocate the full amount provided under AS 37.14.036(c), the Plaintiffs are entitled to obtain an injunction, to which the State shall not object, requiring the commissioner of revenue to allocate the full amount provided under AS 37.14.036(c) to the Mental Health Trust Income Account. If the Legislature reduces the percentage of unrestricted revenue for any fiscal year under the provisions of AS 37.14.036(c), the Plaintiffs may obtain a judgment against the State (as to which the State shall not object) that the reduction is void and obtain an injunction against the State (as to which the State shall not object) from spending the difference between the amount arrived at using the percentages set forth above and the reduced amount.

25. Remedy in the Event of Breach of Good Faith and Fair Dealing. In the event of a breach of the implied covenant of good faith and fair dealing by either party resulting in an inability to complete the reconstitution of the Trust by December 1, 1994 (or such extended time as may be agreed to by the parties), and in addition to other equitable relief, a court may equitably toll the date for reconstitution of the Trust by the amount of time such party is in breach of the covenant.

26. <u>General Remedies for Breach of Reconstitution Provisions</u>. In the event of a breach of the terms of Chapter 66 and this Settlement Agreement pertaining to the reconstitution of the Trust, either party may seek appropriate equitable relief to compel the other party to comply with the terms of Chapter 66 and this Settlement Agreement. If a party seeks equitable relief under this Section, the other party will not assert as a defense to the action that there exists an adequate legal remedy.

27. <u>Remedy for Failure of Hypothecation</u>. In the event that the hypothecation of the Hypothecated Lands is declared ineffective by a final judicial order, the parties shall have 60 days to arrive at a mutually agreeable way to address such invalidity. In the event the parties are unable to arrive at such an agreement, either party has the right to terminate this Settlement Agreement.

28. <u>Remedies for Failure to Reconstitute the Trust</u>. (a) In the event the trust is not fully reconstituted by December 1, 1994 (or such extended date for reconstituting the Trust as may be agreed to by the parties), unless such failure to reconstitute the Trust is due to the lack of good faith on the part of the Plaintiffs, the Plaintiffs shall, in addition to any other remedies they may have, be entitled to foreclose on the Hypothecated Lands as provided in Section 56(d) of Chapter 66 and Article III, Section 29 of this Settlement Agreement.

(b) If Plaintiffs are unable to validly and effectively require reconstitution of the Trust as contemplated under Chapter

66 and this Settlement Agreement, the Plaintiffs may apply to the court for any other appropriate relief.

29. Foreclosure as Remedy. Plaintiffs are not required to foreclose on the Hypothecated Lands prior to seeking any other relief available to Plaintiffs. In the event of foreclosure, (1) the parcels to be foreclosed and manner of foreclosure, and (2) entitlement to the future rents, proceeds, products, and profits derived from the Hypothecated Lands, shall be determined by the court under Sections 56 and 57 of Chapter 66.

30. Termination of Settlement. (a) Except as specifically provided in this Settlement Agreement, any dispute whether termination of the settlement embodied in Chapter 66 and this Settlement Agreement is appropriate shall be resolved by the court under Section 57 of Chapter 66. In considering whether termination of the settlement is appropriate, the following factors shall apply:

(i) the extent to which the Trust has been reconstituted;

(ii) the likelihood that the Trust will be reconstituted as contemplated under Chapter 66 and this Settlement Agreement if the settlement is not terminated;

(iii) the amount of work completed and funds expended toward reconstitution of the Trust as provided in Chapter 66 and this Settlement Agreement;

(iv) the good faith of the parties;

(v) the prejudice to the parties if the settlement is or is not terminated; and

(vi) other appropriate considerations.

(b) In the event this settlement is terminated as provided in this Section or otherwise, the settlement embodied in Chapter 66 and this Settlement Agreement shall be void and, except as provided in Article III, Section 31, the parties returned to their respective positions as if this settlement had never become effective, including the right to re-assert claims to Original Trust Lands.

31. Cancellation of Re-Notice of Lis Pendens and Modification to Remove Preliminary Injunction With Respect to Certain Third Party Transactions. (a) Plaintiffs recorded re-notices of lis pendens affecting all Original Trust Lands in or about September 1990, and by order of the Superior Court dated July 9, 1990, the State has been enjoined

> from issuing any patent(s) or other documents or taking any further steps which convey or transfer mental health trust lands or any interest(s) therein, including without limitation, any permits to use or occupy mental health trust lands, or extract resources from any mental health trust lands, pending final resolution of this litigation or earlier order of this court.

Upon final approval of this Settlement Agreement and Chapter 66 taking effect, all such third party rights are validated and the need to litigate issues relating to title is eliminated. The length of time, however, to obtain approval may cause substantial hardship to certain third parties who have received patents or who have entered into contracts to receive title to Original Trust Lands from the State or municipalities. Therefore, upon presentation of this Settlement Agreement to the court for approval, the State and the Plaintiffs executing this Settlement

Agreement through counsel shall immediately move for cancellation of the re-notice of lis pendens and modification to remove the preliminary injunction with respect to Original Trust Lands in which the State or any municipality conveyed or agreed to convey title to a third party in the form attached hereto as Exhibit H. For purposes of this Section, a conveyance or agreement to convey by the State to a municipality is not one to a third party.

(b) In order to protect the Trust's interests in the Original Trust Lands described in Subsection (a), the parties agree that if the settlement of this action contemplated by Chapter 66 and this Settlement Agreement is not finally approved by the court, the Plaintiffs may reassert claims to such lands. The parties further agree that if the settlement of this action contemplated by Chapter 66 and this Settlement Agreement is not finally approved by the court, or is terminated for any reason, the State shall compensate the trust for the fair market value of any valid interest(s) of the Trust that were cut-off after the date the re-notices of lis pendens were canceled. The compensation may be made in land as comparable in character as practicable to the land for which the Trust's valid interests were cut-off, as provided in Section 55 of Chapter 66.

(c) If the court denies the motion or if an order approving the motion for cancellation of the re-notice of lis pendens and for modification to remove the preliminary injunction set forth in subsection (a) is not entered within 4 months of the date the motion is submitted to the court for decision, the parties shall have 60 days to arrive at a mutually agreeable way to address the

interests of such third parties and the Trust in the parcels of Original Trust Lands. In the event the parties are unable to arrive at such an agreement, either party may terminate this Settlement Agreement.

(d) This Section survives termination of this Settlement Agreement.

ARTICLE IV.
ONGOING RESPONSIBILITIES OF THE STATE AND THE TRUST AUTHORITY

1. General Trust Responsibilities and Obligations. The parties agree that the State, in carrying out its responsibilities and obligations under the Enabling Act, acts through the Governor and his or her Administration, the Legislature, and the Trust Authority.

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

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

(ii) assuring that Trust Property and Trust Funds are administered properly;

(iii) assuring that the Trust corpus is preserved and protected;

(iv) assuring that all revenue derived from Trust Property is deposited into the Mental Health Trust Fund or the Mental Health Trust Income Account as either corpus or

income, as appropriate, pursuant to AS 13.38.010 <u>et. seq.</u>;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. <u>Competing Native Allotments</u>. (a) The State and the Plaintiffs support the prompt adjudication and approval of valid Native allotment applications. The State shall determine whether to challenge the validity of any Native allotment application on Original Trust Lands, Hypothecated Lands, and other State lands identified as Substitute Land or Proposed Substitute Land. The State shall notify Plaintiffs of the State's determinations, which shall be final and not reviewable by the court under Sections 55(h) and 57 of Chapter 66.

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

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

(ii) Since the actual conveyance by BLM of lands to replace the Native Allotment land may not occur for some time,

the Plaintiffs and the State shall jointly determine those lands that are most likely to be conveyed under the Enabling Act instead of the Native Allotment land.

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

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

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

The parties recognize that Chapter 66 imposes certain interim obligations and responsibilities upon the State and Plaintiffs

during the period of implementing the Trust reconstitution. In recognition of those interim obligations, the parties agree:

1. Plaintiffs Will Be Funded by the State. (a) Plaintiffs are entitled to receive from the State sufficient funds to adequately perform the responsibilities imposed upon the Plaintiffs in the reconstitution process under Chapter 66 and this Settlement Agreement. As a general principle, the State and the Plaintiffs shall receive equal funding for equal work effort to be performed under Chapter 66 and this Settlement Agreement. Equal funding for equal work effort to be performed shall take into consideration the different types of work, the different amounts of work, the different costs associated with different types of personnel employed to perform the work, and similar considerations. The intent of this provision is to ensure that neither party obtains a financial advantage over the other. The parties recognize, however, that the scope of the work performed by one party may differ significantly from that performed by the other, and that different amounts of funds may be provided to the parties to reflect this fact.

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

(c) The parties recognize that the there may be some delay in obtaining approval of the settlement embodied in Chapter 66 and this Settlement Agreement, but that work to implement the settlement must begin immediately to ensure that the Trust is

reconstituted in a timely manner. Funding for such work will be provided in accordance with this subsection. Before October 1, the parties will meet to seek agreement on funding for the following fiscal year. If agreement is not reached, or if the legislature appropriates less than the agreed upon amount, the Plaintiffs may apply to the court (1) to determine whether the amount appropriated is reasonable to permit Plaintiffs to perform their responsibilities under the settlement embodied in Chapter 66 and the Settlement Agreement, and (2) if it is not, to determine the appropriate remedy. Nothing in this subsection precludes the State from arguing that the amount appropriated is reasonable in light of all the circumstances. This Subsection is effective as of the date of this Settlement Agreement.

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

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

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

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

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

3. Management of Land After Conveyance. After a parcel of Original Trust Land or Substitute Land has been conveyed to the Trust Authority as provided in Article III, Section 15 hereof, all management authority for that parcel is transferred to the Trust Authority. After an exchange has been completed with respect to a parcel of Non-Reconstituted Trust Land for which the Trust is not to receive title, all management authority for that parcel of Non-Reconstituted Trust Land is transferred to the

State. Nothing herein shall be deemed to prevent the Trust Authority from entering into one or more agreements with the State to manage Trust Lands after management authority has been transferred to the Trust Authority.

4. Land Closed to Mineral Entry. Until such time as a parcel of Original Trust Land has been conveyed to the Trust Authority, or an exchange has taken place with respect to such parcel of Original Trust Land, such parcels of Original Trust Land shall remain closed to mineral entry under State law, and any interests claimed or granted in contravention of this Section are void.

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

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

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

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

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

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

ARTICLE VI.
EXERCISE OF REMEDIES FOR BREACH OR DEFAULT.

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

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

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

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

the parties shall be entitled to pursue, in addition to any specific remedies provided herein for breach of particular terms, covenants, or conditions, any remedies that may be available to them under this Settlement Agreement, or otherwise in law or equity, including declaratory relief or injunctive relief and including specific performance of their rights and obligations hereunder and under Chapter 66.

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

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

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

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

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

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

(b) After notice of reconstitution of the Trust pursuant to Article III, Section 22, of this Settlement Agreement, any remaining responsibilities assigned to the Plaintiffs under this

Settlement Agreement are transferred to the Trust Authority and the Trust Authority may exercise rights and remedies pertaining to the reconstitution of the Trust.

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

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

ARTICLE VII.
INTERPRETATION.

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

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

Counsel of record for the Plaintiffs shall designate one of their number as lead counsel and provide that designation to the Attorney General and the Commissioner. Plaintiffs warrant to the State that the designation of lead counsel confers upon lead counsel all authority necessary to implement the provisions of this Settlement Agreement relating to the reconstitution of the Trust under Chapter 66 and this Settlement Agreement on behalf of all the Beneficiaries, and to sign documents on behalf of and binding upon all Beneficiaries. Plaintiffs' counsel may change the designation of lead counsel at any time, but such a change in designation will not become effective until served upon the Attorney General and the Commissioner. If lead counsel ceases to represent at least one Plaintiff, counsel for Plaintiffs shall immediately designate a new lead counsel and serve that designation on the Attorney General and the Commissioner. Lead counsel may designate one or more co-counsel to exercise specific authority under this Section and shall notify the Attorney General and the Commissioner of such designation.

ARTICLE IX.
MODIFICATION; AMENDMENT.

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

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

(i) the compensation to the Trust;

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

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

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

3. Agreement to Amend Settlement Agreement Prior to Reconstitution. Amendment to this Settlement Agreement by the parties is effective only as hereinafter provided. Prior to the giving

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

4. Agreement to Amend Settlement Agreement After Reconstitution. After the giving of notice under Article III, Section 22 that reconstitution of the Trust has been completed, and except as provided in Article IX, Section 2 of this Settlement Agreement, this Settlement Agreement may only be amended by the court with the approval of the Trust Authority or the Beneficiaries, and notice thereof having been given by publication in newspapers of general circulation throughout the State, and upon approval by the court under such conditions as may be ordered by the court, which may include notice to the Beneficiaries under Civil Rule 23.

ARTICLE X.
INDEMNIFICATION.

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

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

ciaries' responsibilities and obligations under this Settlement Agreement; and

(ii) Plaintiffs, counsel for Plaintiffs, and Beneficiaries from and against any liability (excluding punitive damages) for death, bodily injury, or physical property damage in connection with Original Trust Land, Hypothecated Land or Proposed Substitute Land and arising from the entering into or implementing of this Settlement Agreement, PROVIDED, HOWEVER, that for lands over which Plaintiffs have concurrence authority under Article V, Section 2 of this Settlement Agreement, the State and Plaintiffs' counsel take all commercially reasonable steps to obtain a similar indemnity and adequate evidence of financial responsibility from any private party seeking to use such land, which indemnity and financial responsibility shall be primary to the State's indemnity under this subsection;

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

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

B. the improper disclosure of confidential information;

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

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

E. claims or demands made by the State against the Plaintiffs, counsel for Plaintiffs, or Beneficiaries under this Settlement Agreement.

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

State within 30 days of first knowledge of a claim shall relieve the State of any obligation under this Article.

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

ARTICLE XI.
GENERAL PROVISIONS.

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

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

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

4. Entire Agreement. This is the entire agreement of the parties pertaining to the subject matter hereof and supersedes

all or any other prior agreements and understandings between the parties, representing full and final disposition of the pending claims in this case.

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

ARTICLE XII.
SETTLEMENT OF ACTION.

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

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

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

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

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

DATED this 6th day of April, 1992.

PLAINTIFFS:

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

By: ______________________
David T. Walker

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

By: ______________________
James B. Gottstein

JEFFREY L. JESSEE, ESQ., Attorney for Intervening Plaintiffs ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC

By: ______________________
Jeffrey L. Jessee

STATE:

CHARLES E. COLE
ATTORNEY GENERAL

By: ______________________

APPROVED BY STATE OF ALASKA

WALTER J. HICKEL
GOVERNOR

By: ______________________
Walter J. Hickel

HAROLD C. HEINZE
COMMISSIONER OF NATURAL RESOURCES

By: ______________________
Harold C. Heinze

LIST OF EXHIBITS

EXHIBIT A:	Chapter 66, SLA 1991
EXHIBIT B:	List of Lands Hypothecated to the Mental Health Trust, May 1991 (as refined)
EXHIBIT C:	Mineral Exchange Criteria
EXHIBIT D:	Form State of Alaska Patent
EXHIBIT E:	Form State of Alaska Interim Conveyance
EXHIBIT F:	Release of Interest
EXHIBIT G:	Release from Hypothecation
EXHIBIT H:	Motion and Order to Modify July 1, 1990 Preliminary Injunction and to Cancel Re-Notice of Lis Pendens with respect to Lands Conveyed to Third Parties
EXHIBIT I:	Department Order
EXHIBIT J:	Notice of Cancellation of Lis Pendens

SOURCE: David T. Walker
Counsel for Vern T. Weiss
Mental Health Trust Lands Li..

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 ADDITION REHABILITATION SERVICES,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

90 JUL 10 A9:06

MEMORANDUM DECISION AND ORDER

This case comes before the court on two motions for preliminary injunction. On March 5, 1990, the State of Alaska, defendant, requested a preliminary injunction restraining the plaintiffs, intervenors, and all members of the classes they represent ("plaintiffs") from (1) challenging the current record title to any lands selected by and patented to the state under the Alaska Mental Health Enabling Act, P.L. 84-830; (2) filing lis pendens with the state recorder with respect to any such lands; and (3) taking any other action which would cast a legal cloud on the current record title to any such lands, whether that

legal title be in the state, political subdivisions of the state, or third parties. On June 25, 1990, plaintiffs moved for a preliminary injunction and temporary restraining order prohibiting the State of Alaska from issuing any patents or any other documents or taking any further steps which convey or transfer mental health trust lands or any interest or interests therein, including without limitation, any permits to use or occupy mental health trust lands, or extract resources from any mental health trust lands, pending final resolution of this litigation. On June 29, 1990, the court granted the temporary restraining order associated with the second motion which is valid until July 9, 1990. The court indicated that this decision would issue on July 9, 1990.

To understand the current conflict, it is necessary to understand the history behind this litigation and the activities which have brought us to this point.

In 1956, the Congress of the United States enacted the Alaska Mental Health Enabling Act (AMHEA) in which Congress granted the Territory of Alaska one million acres of federal land to be held as a public trust whose proceeds and income were to be first applied to meet the necessary expenses of the comprehensive mental health program of Alaska. The state managed the lands without maintaining separate accounting until 1978. See State v. Weiss, 706 P.2d 681, 682 (Alaska 1985). In 1978, the Alaska State Legislature in Chapter 181, redesignated the mental health

lands which had been patented or approved for patent to the state as general grant land to be managed as all other state lands.

In 1982, the original Weiss plaintiffs filed this class action asserting that the state breached this public trust by failing to account for revenues realized, using revenues for purposes other than mental health care, and redesignating the mental health lands as general grant land. When first before it, the superior court ruled that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that the trust was to recover from the state an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus prejudgment interest from the date of each conveyance. Additionally, the court ordered a set-off for all monies spent by the state on mental health care. Both sides appealed from that decision. In State v. Weiss, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court held that the state breached the public trust created by Congress when it redesignated property in the trust as general grant land. The court thus invalidated the redesignation statute, Chapter 181, Section 3(a) SLA 1978. The Alaska Supreme Court, however, disagreed with the remedy proposed by the superior court. Instead, the court held "that the trust must be reconstituted to match as nearly as possible the holdings which compromised the trust when the 1978 law became effective." 706

P.2d at 684. The Alaska Supreme Court provided the following guidance to the trial court:

> 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 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 the 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.

706 P.2d at 684. The court specifically declined to rule on questions raised by the amicus regarding the title held by conveyancees and bona fide purchasers of mental health lands. See Weiss, 706 P.2d at 684 n.4.

Following the Alaska Supreme Court's remand to this court, the parties engaged in complex negotiations in an attempt to settle the lawsuit. These negotiations led to the enactment of Chapter 48, SLA 1987. Chapter 48 provided a mechanism for reconstituting the trust and settling this litigation. In essence, four elements were involved. The first element involved the determination of fair market value of the original one million acre mental health land grant as of September 7, 1987, the effective date of Chapter 48. The second element involved an

exchange of those original mental health lands not in legislatively designated areas such as parks and wildlife refuge areas for lands of equal value within such areas so that the reconstituted mental health trust corpus would consist entirely of lands within areas such as parks and refuges. The original mental health lands not in such areas were to be released from trust status. The third element involved the state's rental of the reconstituted mental health trust corpus for eight percent of its fair market value to compensate the trust for administering the lands for legislative purposes. The fourth part was a transitional provision effective until the corpus of the trust was reconstituted. During this transitional period, the state is to compensate the trust by annually paying an amount equal to five percent of the state's unrestricted resources. Section 9 of Chapter 48 provided for the Interim Mental Health Trust Commission to assist in the valuation process.

The valuation process designed in Chapter 48 has broken down. Each side blames the other for problems. Whatever the source of the problems, the parties are at impasse. On November 7, 1989, the Interim Mental Health Trust Commission approved its final procedures for valuing mental health trust lands and on December 20, 1989 it issued its final report. On April 17, 1990, the Commissioner of the Department of Natural Resources wrote to the Chair of the Alaska Mental Health Board

announcing that the Department would not follow the procedures adopted by the Commission. The Commissioner declared an impasse.

During the final days of the legislative session in 1990, a bill was passed which modifies the procedures of Chapter 48. That bill, House Committee substitute for Committee substitute for Senate Bill 493(Fin) [SB 493], deletes the valuation step and ties rents not to the land value but to the state's gross revenues.

In January 1990, plaintiffs sent letters to various interested parties urging these parties to support plaintiffs' position in the political process. The letters indicate a possible intent to challenge title to about 750,000 acres of land.

On March 27, 1990, the Department of Natural Resources advised counsel for plaintiffs that it intended to issue 23 patents to various parcels of mental health trust lands. After that date, the Department announced its intent to issue patents and take other actions such as mineral sales, mining permits, and lease assignments, with respect to various other parcels of mental health trust lands. The Department intended to take these actions on June 30, 1990. On June 29, 1990, the court issued a temporary restraining order forbidding the Department from doing so.

Preliminary injunctions are designed to maintain the status quo pending the final resolution of a case where the

equities of the situations balance in favor of maintaining that position. Preliminary injunctions are not designed to be a final resolution of the legal issues involved in a case nor are they a final resolution of factual matters. As the parties have noted, it is not for the court at this time to determine the final law which will be applied to this case nor to determine which side should ultimately prevail.

While decisions involving preliminary injunctions are frequently difficult ones, the law regarding preliminary injunctions is fairly straight forward. In deciding whether to issue a preliminary injunction, the court must consider three factors: (1) the irreparable harm faced by the party requesting the preliminary injunction; (2) adequate protection for the party opposing the preliminary injunction; and (3) whether serious and substantial questions going to the merits of the case have been raised by the proponent of the preliminary injunction.[1] See, e.g. Betz v. Chena Hot Springs Group, 657 P.2d 831, 837 (Alaska 1982); Alaska Public Utilities Commission v. Greater Anchorage Borough, 534 P.2d 549, 554 (Alaska 1975). The court must balance the hardships by weighing the harm that will be suffered by the

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[1]It is arguable that a fourth element must be considered: the public interest. See Betz v. Chena Hot Springs Group, 657 P.2d 831, 837 (Alaska 1982); Powell v. Anchorage, 536 P.2d 1228, 1229 n.2 (Alaska 1973). The court concludes that this factor has not been adopted by the Alaska Supreme Court in light of its failure to mention it in recent cases. See, e.g., Messerli v. Department of Natural Resources, 768 P.2d 1112, 1122 (Alaska 1989).

proponent if an injunction is not granted against the harm that will be imposed upon the party opposing the injunction by the granting of the injunction. See A.J. Industries, Inc. v. Alaska Public Service Commission, 470 P.2d 537, 540 (Alaska 1970).

The two motions for preliminary injunction pending before the court are related in that each involves the creation of third-party rights in lands which were originally mental health trust lands prior to the 1978 redesignation. The state's principal arguments in each are that (1) the subsequent acts of the legislature in the enactment of Chapter 48 and the 1990 amendments in Senate Bill 493 have changed the situation so that the state is no longer in breach of its fiduciary duty to the trust, and (2) that the plaintiffs' sole remedy for breach of the trust is the payment of compensation given the subsequent actions of the legislature. The fallacy of these arguments is that they ignore the fact that the state may not unilaterally settle this lawsuit. The parties in this action and this court are under the mandatory remand of the Alaska Supreme Court in State v. Weiss, 706 P.2d at 684, to "reconstitut[e] to match as nearly as possible the holdings which compromise the trust when the 1978 law became effective." Moreover, the law of this case is that for the original breach a compensation remedy is not adequate. Id. This lawsuit will not come to its conclusion until a final adjudication on the merits reconstituting the trust is reached or a bilateral settlement is reached which is approved

by the court under the provisions of Alaska R. Civ. P. 23(e). The court is not yet persuaded by the State's arguments that all its actions must be judged under the new legislative standards. While it is true that Chapter 48 as amended is the law, it is equally true that where an appellate court issues a specific mandate, a trial court has no authority to deviate from it. See, e.g., Gaudiane v. Lundgren, 754 P.2d 742, 744 (Alaska 1988). With these principles in mind, the court turns to the specific issues raised by each motion for preliminary injunction.

In its March 5, 1990 motion for preliminary injunction, the state asked this court to issue an anti-lawsuit injunction barring the plaintiffs from challenging title to any mental health lands, filing lis pendens as to such lands, or taking any other action which would case a legal cloud on the current record title to such lands. The state argues that the irreparable harm which it faces is the potential for political pressure brought by such litigation. The state argues that the use of litigation actions to influence the political process would be an abuse of process. The court concludes that this is not irreparable harm. In essence, the state is arguing that it might take precipitous actions favorable to plaintiffs without regard to the substantive merit of those actions because of the political pressure which may result from the multitudinous lawsuits which could be filed by plaintiffs. However, given the supreme court's decision in Weiss and the court's specific reservation as to the title held

by conveyancees and bona fide purchasers of mental health lands in footnote 4 of that opinion, the court concludes that plaintiffs would be within their rights to litigate the issue of third-party rights [2] Moreover, the state may protect itself from precipitous action through the sound exercise of discretion in its decision-making processes.

The court further concludes that plaintiffs cannot be adequately protected. The state argues that the plaintiffs are adequately protected because their remedy is limited to monetary compensation. The court disagrees. It is not at all clear at this point in the litigation that plaintiffs are limited to monetary compensation. That is an issue which is a complex and troubling one. Additionally, the protection to plaintiffs' rights from the January 25, 1990, decision of the Interim Mental Health Trust Commission disapproving any further transactions involving mental health lands will seemingly disappear given the legislature's 1990 amendments of Chapter 48. Under Senate Bill 493, the legislature has repealed the provisions which created and empowered the Interim Mental Health Trust Commission. Presumably, the orders of the Commission will no longer be valid.

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[2]The state also argues that multiple suits could reek havoc with the courts and divest this court of jurisdiction. The court relies on plaintiffs' counsel's assurances of an orderly development of litigation under this court's supervision.

The state has presented a serious and substantial claim regarding third-party rights and whether any such rights may be "undone."

Taking all these factors into consideration and balancing the hardships as required by the law, the court must conclude that the State's motion for preliminary injunction is denied.[3]

In their June 25, 1990, motion for preliminary injunction, plaintiffs sought injunctive relief precluding the state from issuing patents or other title documents or taking any further steps which convey or transfer mental health trust lands or any interests therein including permits to use and occupy mental health trust lands or extract resources from mental health trust lands pending final resolution of the litigation. The state argues that such injunctive relief is not called for under the facts of this case given that the proposed transfers are of "vested rights," that is rights which attached prior to the Alaska Supreme Court's decision on October 4, 1985. The state

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[3]The court is not unmindful of nor unsympathetic to the problems which may be created for third-party holders of lands originally designated as mental health trust lands. It is very possible that innocent third-parties will have their rights to those lands tied up in court for a period of time. There is no question that such actions may be harmful to individuals. However, it must be stressed that the problem arises not because of actions of plaintiffs or this court but because of the actions of the State in violating its trust responsibilities when it redesignated mental health trust lands as general grant lands in 1978. Had the legislature taken its trust obligation seriously, these innocent third-parties would not have been adversely affected.

argues that the plaintiffs are adequately protected without such injunctive relief given its rental payments to the trust under the provisions of Chapter 48 and SB 493. Further, the state argues that actions are clearly allowable under Section 202(e) of the Alaska Mental Health Enabling Act. Again, the problem with the state's reasoning is that it ignores the mandate of the Alaska Supreme Court in Weiss. If this court must reconstitute the trust as of the date of the redesignation, July 19, 1978, it necessarily follows that the court should take requested action to preserve the status quo. It is true that Section 202(e) of the Alaska Mental Health Enabling Act gave the Alaska Legislature the power to sell, lease, mortgage, exchange, or otherwise dispose of the mental health lands. However, as the Supreme Court has clearly held in this case, it must do so in light of its fiduciary responsibilities to the trust. One of those responsibilities is to preserve the corpus of the trust. Weiss, 706 P.2d at 683. It is similarly clear that it is the duty of the state in administering this trust to administer solely in the interest of the beneficiaries. See State v. University of Alaska, 624 P.2d 807, 813 (Alaska 1981). Given that these third-party interests were created prior to the Supreme Court's decision in Weiss in 1985, it is clear that they were created at a time when the state was not fulfilling its trust responsibilities. Thus, there is a serious and substantial question regarding the validity of these third-party rights.

The court further concludes that the plaintiffs are subject to irreparable harm if the preliminary injunction is not granted. The actions of the state have the potential of creating bona fide purchaser rights where it is possible that they would not otherwise be. In such an instance, there is no question that such lands could not be taken from third-party hands and placed into the reconstituted trust. These lands are clearly income-producing properties which could be managed to produce long term income for the trust itself. If the lands are lost they may be lost forever. Additionally, since the legislature's repeal of the statute creating the Interim Mental Health Trust Commission, there is no other way to protect the lands other than through court action.

The state can be adequately protected. The preliminary injunction would not undo any of the state's commitments; rather, it would delay execution. The effect of the preliminary injunction would be to temporarily prevent the state from transferring title to the mental health trust lands to third-parties pending resolution of the claims in this lawsuit. For these reasons and those set forth in the findings of fact issued by the court, the court concludes that the preliminary injunction should issue.

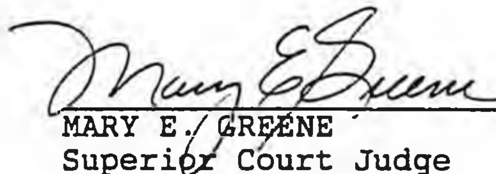
Plaintiffs have argued, and the state does not oppose, that the court should issue the preliminary injunction without bond. It is clear here that the plaintiffs themselves are financially unable to post a bond. It is also true that this is

public interest litigation. In light of these facts, the court concludes that the injunction will issue without bond.

Because of the impact on third-parties of this preliminary injunction, it is the court's desire to speedily resolve the issue of challenges to third-party holdings. The court urges the parties to move expeditiously to file whatever motions must be filed so that after complete and thorough briefing, the court may resolve the legal issue regarding potential challenges to title held in third-party hands. The court is concerned about the effect of this injunction on third-party rights and, thus, if the parties do unreasonably delay in moving this issue along, the court will schedule a status conference and set a briefing schedule.

IT IS SO ORDERED.

DATED this 9th day of July, 1990, at Fairbanks, Alaska.



MARY E. GREENE
Superior Court Judge

I certify that on 7-10-90 copies of this form were sent to:
CLERK: LCH

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James B. Gottstein
Lawrence V. Albert

MEMORANDUM

FROM: JAMES B. GOTTSTEIN
TO: INTERESTED PARTIES
DATE: January 19, 1990
RE: LEGAL ANALYSIS OF STATUS OF MENTAL HEALTH TRUST LANDS AND RELATED ISSUES

Summary and Purpose

The Commissioner of the Department of Natural Resources is expected to announce on January 24, 1990 that she does not intend to follow the procedures to determine the fair market value of one million acres of Mental Health Trust Lands which the Interim Mental Health Trust Commission (Commission) approved pursuant to Chapter 48 SLA 1987 (Chapter 48). If this expected action occurs, the Plaintiffs in the Mental Health Trust Lands lawsuit, Weiss v. State, 4FA-82-2208 Civ., will be forced to challenge title to approximately 750,000 acres of Mental Health Trust Lands and take other actions, as necessary steps to protect their rights against the continuing breach of the trust by the State of Alaska in properly discharging its fiduciary responsibilities in managing the trust.

The land categories are:

370,000	acres designated as state parks, refuges, etc.;
40,000	acres to Municipalities;
40,000	acres to Native corporations[1];
45,000	acres to individuals;
3,000	acres to the University of Alaska; and
280,000	acres in less than total conveyances.
778,000	

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1. It does not appear this would include a large portion of the Beluga Coal Field conveyed to Cook Inlet Region Inc., as a result of its exchange under the Alaska Native Claims Settlement Act.

The purposes of this memorandum are to outline the relevant facts and legal authority for such actions.

I. FACTUAL BACKGROUND

In 1956, the Congress, in order to correct a longstanding problem in providing an adequate mental health program in Alaska, granted Alaska, in trust, one million acres of land to generate income "first for the necessary expenses of the mental health program of Alaska". Unfortunately, after selecting the best lands available, Alaska never administered the trust properly. This included transferring Mental Health Trust Lands to third parties without adequate compensation. Starting in the mid-Seventies, the State began to recognize this was illegal, and at the same time there was a tremendous clamor for land by municipalities and other interested parties (without paying for it, of course).[2] In 1978[3] the legislature purported to abolish the trust by "redesignating" Mental Health Trust Lands as General Grant Lands.[4] While a theoretical compensatory monetary fund was established, Mental Health Trust Lands were never valued to determine the proper compensation, and more importantly, **not a single penny was ever paid into this account.** Immediately after the "redesignation", municipalities, Native corporations and individuals began to receive large amounts of the best Mental Health Trust Lands without paying fair value for them.

A lawsuit was brought in 1982 by the Alaska Mental Health Association, through Steve Cowper[5], naming Vern Weiss and Karl Hilliker as representatives of people needing mental health services, the beneficiaries of the Mental Health Lands Trust, to declare the legislative action in abolishing the trust invalid. The Supreme Court, in 1985, did just that and ordered "the trust be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." State v. Weiss., 706 P.2d 681 (Alaska 1985). However, the state

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2.This was the period of the "Beirne Initiative" where residents were to be allowed to stake "undesignated" state land for private ownership.

3.In the same package of legislation providing land to residents enacted as a response to the "Beirne Initiative".

4.Chapters 181 and 182 SLA 1978.

5.Governor Cowper has apparently been advised by the Attorney General's Office that as former attorney for the plaintiffs it is inappropriate or improper for him to take an active role in resolving the lawsuit. This has left a policy vacuum.

desired to avoid reversing previous actions it had taken on Mental Health Trust Lands, and the plaintiffs in the lawsuit were challenging conveyances of trust lands to third parties (for the reasons set forth below). An alternative method of reconstituting the trust was agreed on between the plaintiffs and the state. This approach was enacted as Chapter 48 SLA 1987 (Chapter 48).

Among other things, Chapter 48 provided that Mental Health Trust Lands be valued and an equal value of lands in legislative designations (state parks, refuges, critical habitats, and the like) be constituted as a replacement trust, with 8% of the value being deposited every year into the Mental Health Trust Income Account. Under Section 4 of Chapter 48, the value is to be determined by the Commissioner of the Department of Natural Resources under procedures approved by the Interim Mental Health Trust Commission (Commission). On November 7, 1989, after more than two years of a tremendous amount of work, the Commission approved its final procedures for determining the value of Mental Health Trust Lands. At this time, all indications are that the Commissioner is intending to refuse to follow these procedures. If the Commissioner fails to follow the approved valuation procedures the proposed settlement of the litigation will be nullified and the plaintiffs will be forced to challenge the legal status of the hundreds of thousands of acres of Mental Health Trust Lands described above and take other steps to protect their rights.

II. APPLICABLE LAW

A. General Considerations. In the Weiss decision (this case), supra., the Alaska Supreme Court confirmed that "basic trust law principles" apply to the administration of the Mental Health Lands Trust. In doing so, at footnote 3, the court cites the United States Supreme Court case of Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L.Ed.2d 515 (1967), and its own previous decision in State v. University of Alaska, 624 P.2d 807 (Alaska 1981).

76 American Jurisprudence, 2d, Trusts, Section 315 describes generally the trustee's duties as follows[6]:

> A trustee must act in good faith in the administration of the trust, and this requirement means that he must act honestly and with finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length in the workaday world, but with a punctilio of honor the most sensitive. He must act with such high good faith in the

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6.References to footnotes are generally omitted throughout this memorandum.

> exercise of decisions in the administration of the trust, and in the investigation and determination of facts as a basis for his judgment and decisions. He must avoid all situations and relations tending in the least to interfere with the discharge of his duties, or in which honesty may be a strain on him. Any exceptions in his conduct to the high standard of honor governing him renders him fully liable for all ensuing damages to the trust estate. Courts of equity have been uncompromising in their hostility to any laxness on the part of a trustee and inquire in proper cases into his administration of the trust to determine his honesty and loyalty. The liberality with respect to a trustee of provisions in a trust instrument or declaration in no way diminishes the trustee's duty to act in utmost good faith.

Section 316, Trusts, 76 American Jurisprudence, 2d., describes how a trustee must act exclusively in the trust's interests:

> A trustee in his administration of the trust is under the duty of acting exclusively and solely in the interest of the trust estate or the beneficiaries within the terms of the trust, and is not to act in his own interest or in the interest of a third person. He must act for and not against the trust estate or the beneficiary. In general, any act of the trustee in hostility to the interest of the trust estate is a breach of trust. He may not without breach of duty take part in any transaction concerning the trust, where he has an interest in such transaction adverse to that of the beneficiary.
>
> A trustee is under a duty to refrain from situations wherein his own interests are brought into conflict with those of the trust, irrespective of good or bad faith on his part. He must not do anything tending to interfere with his exercise of a wholly disinterested and independent judgment.

In conformance with the above described standard of conduct by a trustee, one of the basic principles of trust law is that the trustee must keep trust property separate from his individual property. Section 179 Restatement of the Law of Trust, 2d.

Similarly, a trustee may not engage in self-dealing with trust property.

> A trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries, and it is a well established general rule that a trustee should not engage in self-dealing * * *.

* * *

> The prohibition against self-dealing or mingling of funds by a trustee does not depend upon any question of fraud, but is made absolute to avoid the possibility of fraud and to avoid the temptation of self-interest.

76 American Jurisprudence, 2d., Section 319. This is not a new principle. In the 1823 United States Supreme Court case of Wormley v. Wormley, 8 Wheaton 421, 5 L.Ed 651 (1823), Justice Story wrote:

> No rule is better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters.

In the case of the Mental Health Lands Trust, the dishonest and unscrupulous actions of the state[7] in the administration of the trust[8] makes a mockery of the just enunciated standards of conduct. The following is a description of the remedies appro

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7.While the state, as a whole, has acted abominably with respect to the trust, the state is composed of many different parts, and with some notable exceptions it is hard to cast particular individuals as culpable. The 1978 legislature, for example, can say it intended to compensate the trust and no bad faith was involved. From 1978 until the lawsuit, DNR can say it was just following state law. The 1987 Legislature can say it acted in good faith in enacting Chapter 48 and expected the Commissioner of DNR to follow the procedures approved by the Commission. On the other hand, the administration's budgeting process clearly does not properly allocate trust funds "first to the necessary expenses of the mental health program", and the Legislature certainly has not corrected this in its appropriations. Similarly, DNR has not been at all concerned with making sure the trust is fairly compensated.

8.The barest outline of facts given here does not even scratch the surface of the repeated, deliberate and determined efforts of the state to avoid its trust responsibilities and convert trust property to its own use without compensation to the beneficiaries of the trust, who, after all, are among the most defenseless in the population.

priate for this breach of trust, including the rights of the beneficiaries to pursue trust property into the hands of third parties, and hold third parties accountable to the trust in the event of their participation in the breach of trust.

B. Only Purchasers For Value Without Notice Have Valid Title to Mental Health Trust Lands.

1. General Requirements.

Only bona fide purchasers -- that is people who have paid value for trust property and are without notice, either actual or imputed of the trust or the breach of trust have valid title to Mental Health Trust Lands. The reason for this rule is that as between the clearly innocent beneficiary and a third party who has obtained trust property, the beneficiary should not suffer the loss, unless the third party can prove he was innocent as well. In proving his innocence, the law charges the third party with knowledge of certain facts and with the duty to make an inquiry into other facts where he should have been wary. Bogert in The Law of Trusts and Trustees, Revised Second Edition[9]., devotes a whole chapter (43) to the "Bona Fide Purchaser Rule".

Section 881 of Bogert states the basic bona fide purchaser rule:

> A most important rule which limits the power of a beneficiary or other holder of an equitable interest to pursue and claim property is the doctrine to the effect that the transfer of the legal estate in property to a bona fide purchaser for value cuts off all equities in the same property. Thus if a trustee holds under the trust the legal title to real estate (the trust not being on the record), and the trustee sells the land to a purchaser who does not know of the trust, or have reason to know of it, and who pays a valuable consideration for the legal title, the latter gets an interest free and clear of the trust, and the beneficiary cannot get the aid of a court of law or equity in obtaining the legal title or possession.

Section 887 of Bogert states:

9.Hereafter referred to as "Bogert".

It is well settled that in order to have the benefit of the bona fide purchaser rule, the taker of the legal title must have "paid value," or must have been a taker "for a valuable consideration."

2. Notice.

Section 891 of Bogert discusses the various categories of notice as follows:

> The cases and statutes describe the person who can qualify for the protection of the rule as "an innocent purchaser", or a "bona fide purchaser", or a "purchaser without notice" of the equity in favor of another person which, it is claimed, has been cut off. The fact of which it is alleged the purchaser had no notice may be either (1) the mere existence of the trust or other equity or (2) the extent of the powers of the trustee under a known trust. In discussing these problems the courts and writers use various words and phrases, not always consistently, for example, "knowledge", "notice", "actual notice", "implied notice", "constructive notice", "absolute notice", and "facts putting on inquiry". It is believed that confusion can be avoided by using the single word "notice", and defining it to include awareness of a fact which the party either had actually, or should have possessed, or which the law regards him as possessing.
>
> One who is a purchaser of property which is subject to an equity may be in any one of several different situation with regard to notice as to whether the property comes to him charged with an equity or free from all equities.
>
> (1) He may have no knowledge or information, either actual or imputed under a statute or otherwise, which would lead a reasonable man either to know that there was an equity attached or to inquire further with respect to the possibility of such equity being attached. In this case he is an "innocent purchaser," or "purchaser without notice."
>
> (2) He may have knowledge, coming to him or his agent through the senses of sight or hearing, which shows that the property in question is being transferred to him subject to an equity. In this case he may be said to be a "purchaser with actual notice."

(3) He may have notice of an equity, imputed to him through recording or other statutes, in which case he is usually called a purchaser "with constructive notice." For purposes of public policy the statutes treat him as having notice, whether or not he is actually conscious of the existence of the equity.

(4) He may have knowledge of facts about the ownership of the property, either actually acquired by himself or his agent, or imputed to them under statutes, which, while not sufficiently strong to lead an ordinarily prudent man to a positive belief that the property is subject to an equity, is of sufficient force to compel an ordinarily careful man to inquire further regarding a possible equity. If such is the case, the purchaser is charged by the court with notice of the facts regarding the equity which a reasonable inquiry would have revealed. A purchaser of this type is one "put upon inquiry," and if the inquiry ought to have led to notice of the equity he is treated by the court as if he had had actual notice of it.

(5) A purchaser may become a purchaser with notice because of a combination of the factors of actual notice, constructive notice, and notice acquired from facts putting on inquiry. Thus he may have information from each of the three types of sources, no one of which, standing alone, would make him a purchaser with notice of an attached equity, but which, in combined effect, give him the requisite knowledge to make him a mala fide purchaser.

(Emphasis added)

Section 892 states:

If the proof shows that the purchaser was conscious of the existence of any equity against the property, there is no doubt that he cannot get the benefit of the bona fide purchaser rule.

Section 893 of Bogert "Constructive Notice under Recording Acts", states:

From the time of filing for record, all purchaser of the property involved, and in many cases creditors are charged with knowledge of the existence and contents of the document in question. It is clear that these statutes are frequently of importance in giving to a purchaser from a trustee or other holder of property subject to an equity notice of the existence and terms of the trust. This notice is generally called "constructive". It exists no matter what may be the purchaser's actual knowledge. Thus one purchasing land

is charged with notice of the terms of the recorded deed to his grantor and with the terms of all prior recorded deeds in the chain of title. If the grantor or a predecessor of the grantor is described in the deed by which he acquired title as a trustee, with or without details of the trust, the purchaser is deemed to know of the existence of such a trust and of such details as to names of beneficiaries, purposes of the trust, powers of the trustee, etc., as are given in the recorded instrument. Such facts thus treated as being known to the purchaser may give him constructive notice that he will take the property subject to an equity in favor of the beneficiary, or they may merely **put him on inquiry** as to whether he will get title free of the trust or not.

* * *

At common law the mere pendency of some actions with regard to the title to property made a purchaser during the pendency of the action take subject to the claims of the parties as later adjudicated. Statutes now provide that in an action affecting the title to realty a notice of the pendency of the action may be filed in the real property record office, and that it shall be constructive notice to purchasers of the realty pendente lite. These statutes constitute another source of constructive notice to purchasers of realty who claim to be bona fide purchasers.

Section 894 of Bogert states:

> If the prospective purchaser of the trust property, or of other property subject to an equity, learns of facts personally or through an agent which, while not conclusively showing the existence of a trust or other equity, would lead an ordinarily prudent man to a belief that there was a possibility that an equity existed, the purchaser has a duty to make a reasonable inquiry concerning the existence and nature of the possible equity, and he will be charged with knowledge of the facts concerning the equity which a reasonable investigation would have brought to light.

Section 894 of Bogert, states:

> In most cases where there is a written trust instrument, and the purchaser knows of it, or could have learned of it with reasonable effort, he will be charged with the duty of examining that instrument.

* * *

> The duty to inquire may be merely as to the existence of a trust or other equity, or it may include also the extent of the powers of the trustee and the question whether the trustee has duly exercised the powers granted to him.

The 1823 United States Supreme Court case of Wormley v. Wormley, cited above, demonstrates again this is not a new legal principle.

> The next point for consideration is, whether the defendants, Veitch, and Castleman and McCormick, were bonae fidei purchasers of the Frederick lands, without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts; and their general denial of all knowledge of fraud will not help them, if in point of law, the transaction is repudiated by a court of equity. If they were bonae fidei purchasers, without notice, their title might have required a very different consideration.
>
> * * *
>
> It appears to us therefore, that the circumstances of the case can lead to no other result than that Castleman and McCormick were not purchasers without notice of the material facts constituting the breach of trust; and that, therefore, the Frederick lands ought in their hands to stand charged with the trust in the marriage settlement.

Interestingly, in Justice Johnson's separate opinion he objected to the characterization of the transactions as being in bad faith or unfair, but nevertheless agreed with the result:

> I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice, and ingratitude in the conduct of the latter.
>
> * * *
>
> Nevertheless, there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orizon, "lead us not into temptation."
>
> * * *
>
> It is unquestionable, from the evidence, that both Veitch, and Castleman and M'Cormick, must be affected by both legal and actual notice of the transactions of

Strode. They are, therefore, liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which requires this adjudication, may, in many cases, be a hard one, but is a fixed rule, and has the sanction of public policy.

C. Identifiable Trust Property not in the Hands of a Bona Fide Purchaser Can be Returned to the Trust.

Bogert at Section 866 states:

"The law is now well settled that as between the cestui que trust[10] and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." [citation omitted]

This doctrine has been expressed by the Supreme Court of California in the following words: "It is well settled that the beneficiary of a trust may follow and recover the trust fund if any property in the hands of the trustee or of those taking with notice can be identified either as the original property of the cestui que trust, or as the product of it."

This right of the beneficiary is not that of a lienholder or a preferred creditor. It is based on a property right in the res or its substitute. "The right of the beneficiary to pursue a fund and impose upon it the character of a trust is based on the principle that it is the property of the beneficiary, not upon any right of lien against the wrongdoer's general estate; and this, whether the property sought to be recovered is in the form in which the beneficiary parted with its possession or in a substituted form.

(Emphasis added).

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10. Beneficiary or purpose of a trust.

The court in Rogers v. Rogers 473 N.E. 226 (N.Y. 1984) stated:

> [O]ne who possesses equity in an asset is entitled to restitution of the asset by a subsequent title holder who paid no value even if the latter had no knowledge of the predecessor's equitable interest.

In Paolino v. Channel Home Centers, 668 F.2d 721, 723 (3rd Cir. 1982) the court said:

> If a purchaser of property from a trustee knew, or should have known, that disposition of the property was a breach of trust, the purchaser is charged with the same trust.

With respect to a donee of trust property, Section 868 of Bogert states:

> A donee who receives trust property transferred to him in breach of trust, although he does not know of the breach, is liable to return the trust property or its product as long as he holds it.

That these general trust law principles apply to trust lands such as Mental Health Trust Lands cannot be seriously questioned. See Murphy v. State of Arizona, 181 P.2d 336 (Ariz. 1947). Indeed, Murphy held that deeds issued in violation of the trustee's authority were "null and void" and subsequent holders whether bona fide purchasers or not did not have good title because there was nothing to purchase[11]:

> If * * * these enactments [conditions upon which trustee may dispose of trust property] are mandatory upon

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11. The court in Murphy described the reasons for the trust restrictions thusly:

The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

> the Board, or are jurisdictional in effect, or conditions to be performed before power vests in it to make the conveyance, then their deed is a nullity and gives rise to no rights whatever either in the grantee or in purchasers for value from him.

See also The United States Supreme Court case of Alamo Land & Cattle Co. v. Arizona, 424 US 295, 47 L.Ed 2d 1, 96 S.Ct 910 (1976) and U.S. v. 78.61 Acres, 265 F.Supp 564 (USDC Neb. 1967), which was cited with approval by the U.S. Supreme Court in Alamo.

E. Parties who have "Participated in the Breach of Trust are Liable for the Damages Occasioned Thereby.

Bogert, Section 901 states persons participating in a breach of trust can be held liable for the damages to the trust:

> The wrong of participation in a breach of trust is divided into two elements: (1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge.
>
> * * *
>
> [I]f the third party by any act whatsoever assists the trustee in wrongfully transferring the benefits of the trust property to the trustee, another person, or the alleged participant, or aids in destroying or injuring that property, there has been conduct upon which liability can be predicated, * * *.

Section 868 of Bogert states:

> [N]o third person shall knowingly aid the trustee in committing a breach of his duties.
>
> * * *
>
> If a third party takes part with the trustee in a breach of trust, the alternative remedies of money claim or tracing of trust property may be applied to him and, as to the trustee, in addition to other relief.
>
> * * *
>
> [T]he trust property or its product has been traced to the hands of the third party-participant and the beneficiary has been able to reach it there. If the bene-

ficiary believes that the third party has participated in a breach and has proceeds of the trust property in his hands, the beneficiary may obtain an accounting from the third party and may ask, in the same suit, for tracing as to all property identified and a money judgment as to the balance.

D The State should be Enjoined[12] from Further Transfers of Mental Health Trust Lands and Possibly All State Lands; Receipts from All State Lands Are Subject to Impoundment; Traceable Trust Property in the Hands of Third Parties is Subject to the Trust's Claims.

Section 861 of Bogert states:

> The court may order the trustee or his successor in interest to perform the trust as a whole, or to take some particular step in trust administration.
>
> * * *
>
> The court may in its discretion require the defaulting trustee to restore to the trust fund or deliver to the beneficiary particular property other than money, by way of restitution in kind.
>
> * * *
>
> [T]he beneficiary may claim part of a trust fund under a constructive trust theory and recover money damages for conversion or misappropriation of the other part.

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12. Under Civil Rule 65(c) a bond will normally be required to obtain an injunction in order to cover any costs which may be incurred if the injunction later turns out to have been wrongfully issued. There are numerous cases, however, which hold that such a bond is not necessary (or may be posted in a nominal amount) if the party seeking it is a public interest litigant, or is indigent. The beneficiaries of the Mental Health Lands Trust qualify under both criteria. See People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319 (9th Cir. 1985); Natural Resources Defense Counsel v. Morton, 337 F.Supp. 167 (D.C.D.C. 1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc., v. Corps of Engineers, 331 F.Supp. 925 (D.C.D.C.. 1971); Orantes-Hernandez v. Smith, 541 F.Supp. 351 (D.C. Cal. 1982); Bartels v. Biernat, 405 F.Supp. 1012, 1019 (D.C. Wis. 1975); Bass v. Richardson, 338 F.Supp. 478 (D.C.N.Y. 1971); Denny v. Health & Social Services Bd., 285 F.Supp 526, 527 (D.C. Wis 1968).

Section 862 of Bogert states:

> For a breach of trust the trustee may be directed by chancery to make a payment of damages to the beneficiary out of the trustee's own funds.

Section 865 of Bogert states:

> [I]f the trustee who has defaulted has in his hands the trust res or its substitute, the right of the beneficiary to hold the trustee to personal liability may in some cases be supplemented by a lien upon the res or its substitute.
>
> * * *
>
> And so too, if a third person has in any way rendered himself liable to the beneficiary to pay damages in money and such third person is not a bona fide purchaser but has title to part or all of the trust res, or to any property which is the successor or product of part or all of the trust property, the beneficiary may obtain a decree from the court that the beneficiary's claim for money damages be declared a lien on such property and be satisfied out of it.
>
> * * *
>
> If the beneficiary chooses to rely on money liability plus this equitable lien on the trust property or its proceeds, he has obviously made an election inconsistent with tracing the trust property and claiming it as his equitable property. Under this lien theory the property is that of the defendant trustee or third person absolutely. Under the tracing plan the plaintiff claims that legal title to the res in question is held by the defendant but that it is equitably owned by the plaintiff. The value of the traceable property will usually determine the beneficiary's choice between the lien theory and the tracing method. If a trustee, for example, has stolen trust funds in the amount of $10,000 and invested them in realty in his own name, and the realty has become worth more than $10,000 it will be advantageous for the beneficiary to elect to recover that realty in complete satisfaction of the claim for conversion of trust principal. On the other hand, if the real property has decreased in market value to $8,000, it will be expedient for the beneficiary to obtain a money judgment against the trustee for $10,000 on account of the misappropriation of the trust principal, sell the realty under a lien and realize $8,000 therefrom, and still have a claim for $2,000 under his judgment.

In Moody v. Pitts, 708 S.W. 930 2d. (Texas App. 1986), the court stated:

> If a trustee commingles trust funds with the trustee's own, the entire commingled fund is subject to the trust.

In Blair v. Trafco Products Inc., 369 N.W.2d 900 (Mich. App. 1985) the court said:

> [W]here mingling of trust funds with other funds occurs, the cestui que trust has a lien upon the entire fund, and the law presumes that the trust fund was not paid out so long as an amount equal to the trust fund remained.

F. Appointment of A Receiver on Mental Health Trust Lands and Replacement of the State as Trustee.

Restatement of Trusts 2d., Section 107 (a) states a trustee can be removed by a proper court. Relevant comments to that section state:

> a. **Removal by Court.** A court may remove a trustee if his continuing to act as trustee would be detrimental to the interests of the beneficiary. The matter is one for the exercise of a reasonable discretion by the court.
>
> b. **Grounds for Removal.** The following are, among others, grounds for removal of a trustee: * * * the commission of a serious breach of trust

Section 108 of the Restatement of Trusts 2d., states if a trustee has been removed the court can appoint a new trustee.

Section 199(e) of the Restatement of Trusts 2d., states the beneficiaries can maintain a suit to remove the trustee. Section 519 of Bogert states, "When in the course of the administration of a trust it becomes apparent that the trustee cannot in fairness to the beneficiaries be allowed to continue in the exercise of his powers, he may be removed."

Bogert states at section 867:

> Sometimes a court can be induced to appoint a receiver for the trust property in order to protect the trust and conserve its assets, pending its decision on an application for the removal of a trustee or for other relief. The rule regarding receivers has been stated by a Georgia court: "Besides it is an established rule of the Court of Chancery, that when a trust fund is in

danger of being wasted or misapplied, it will interfere on the application of those interested in the fund, and by the appointment of a receiver, or in some other mode, secure the fund from loss."

A New York court has said: "it is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper, if the fund is in danger; and this principle reconciles the cases found in the books.

III. APPLICATION OF THE LAW TO THE FACTS HERE

A. Notice Through Public Records.

There is a very strong argument that everyone is charged with notice of the trust and later the breach thereof because of the following.

(a) Deed. The Patents (deeds) to the state indicate that the grant is pursuant to the Alaska Mental Health Enabling Act.

(b) Provisions of the Alaska Mental Health Enabling Act. The Alaska Mental Health Enabling Act is a public law and all persons taking Mental Health Trust Lands should be either charged with constructive notice of the trust requirements or put on inquiry.

(c) The 1978 Trust Abolishment. The purported redesignation of Mental Health Trust Lands by the legislature in 1978 and the failure to compensate the trust one penny was a matter of public record and persons taking Mental Health Trust Lands should be either charged with constructive notice thereof or put on inquiry.

The legal result of being charged with notice is that one can not be a bona fide purchaser. Thus, under this analysis no third party can have good title to Mental Health Trust Lands, no matter how far removed down in the chain of title.[13] Even if the court does not conclude everyone is charged with notice, under the specifics of many cases, third party conveyees do not have good title.

13.Of course, there very well may be a cause of action against the State for conveying bad title.

B. Specific Examples.

1. Legislative Designations (Parks, Refuges, etc).

As indicated previously, some 370,000 acres of Mental Health Trust Lands has been designated as state parks, refuges, etc. Since title remains in State ownership there can be no real argument but that these lands remain trust property. Just as clear is that the legislative designations are an improper method of management of Mental Health Trust Lands. Instead these lands have to be managed to achieve maximum income for the beneficiaries (as do all Mental Health Trust Lands). Thus, all of these lands must be commercially developed to the extent it is possible and furthers the purpose of providing income to the Trust. For example, when it will be in the best interests of the beneficiaries of the trust to do so these lands must be opened for mineral development.[14]

2. Municipalities

Since the municipalities were in the forefront of pressuring the state to redesignate Mental Health Trust Lands, not only must the 40,000 acres selected and/or conveyed to Municipalities be returned, but municipalities should be liable to the beneficiaries for participating in the breach of trust.

3. Native corporations.

By far, Cook Inlet Region Inc., has received the lion's share of the 40,000 acres that have been conveyed to Native corporations.[15] There is no question but that Cook Inlet knew of the trust status of the lands and the breach of the trust. It has been Cook Inlet's legal position that Congress authorized its receipt of the bulk of the Beluga Coal Field when it approved the Cook Inlet Land Exchange. However, counsel for Cook Inlet has not explained how Congress could give away something it no longer owned.

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14. That the lands have to be managed to produce maximum income does not mean that the trustee may sacrifice long-term income for immediate income.

15. The 40,000 acre figure does not include lands lost by the state in its lawsuit with Tyonek Native Corporation over conflicting selection rights under the Alaska Mental Health Enabling Act and the Alaska Native Claims Settlement Act Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237 (9th. Cir. 1988), nor the Beluga Coal Field lands exchanged to Cook Inlet in its exchange.

4. Individuals.

(a) Constructive Notice. As indicated above, title to all Mental Health Trust Lands is in dispute, even if formally conveyed by the state to individuals. All of these third party conveyees will be brought into the lawsuit[16] and notified that their rights to Mental Health Trust Lands is in dispute. They will then have to defend their title to Mental Health Trust Lands as a Bona fide purchaser. As outlined above, however, it seems that "constructive notice" of the trust and breach of the trust will be imputed to individuals on the basis of the public records by the court. Even if the court does not charge every individual recipient with constructive notice, then each person receiving Mental Health Trust Lands or interests therein must prove that he paid value for the land and that he did not otherwise have notice, either actual or constructive, of the trust or the breach.

(b) Leases. The same analysis would hold for leases.

5. University of Alaska.

There is no question but that the University of Alaska knew about the trust status of the 3,000 acres it received conveyances of. Indeed, it is particularly flagrant since it received these conveyances in settlement of its lawsuit with the state for the same breach of trust in redesignating University Trust Lands as General Grant Lands.

6. Less than total Conveyances.

Again, the same sort of analysis applies to the other 280,000 acres in less than total conveyances that have been made on Mental Health Trust Lands. However, certain categories of less than total conveyances merit discussion.

(a) Mining Leases. Since the state did not have real mining leases prior to the decision of the Alaska Supreme Court in the 6(i) case[17] and no rents or royalties were ever paid these

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16. Whether individually or as a member of one or more defendant classes.

17. Trustees for Alaska v. State Department of Natural Resources, 736 P.2d 324 (Alaska 1988). In this case, the Alaska Supreme Court ruled that the state's practice of granting rights to extract minerals, although denominated a "lease" was not truly a lease because no rents or royalties were due and that this violated Section 6(i) of the Statehood Act which requires a lease of mineral resources.

leases are invalid.[18] Of course, the operators of these mineral properties are accountable for royalties due to the trust for the minerals that have been removed and arguably for minimum royalty and/or rental payments.

(b) Oil & Gas Leases. It strains credulity to believe that oil companies did not actually know of the trust status of the lands because a detailed assessment of land status and title is normally done by any prudent potential oil and gas lessee.[19]

(c) Public and Charitable Uses. As described above, trust property given for a charitable purpose, where payment of value and lack of notice is not present normally must be returned to the trust.

There are many other types of transactions and circumstances that will no doubt be revealed. The foregoing, rather than intended to be exhaustive, is to illustrate the general principles involved and how they should be applied in particular circumstances.

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18. As recently as May of 1989, the United States Supreme Court held that a flat rate royalty for mineral lands was an invalid method of leasing mineral trust lands and the statute authorizing it invalid as applied to Arizona's School Trust Lands. Asarco v. Kadish, 490 US ___, 104 L.Ed 696, 109 S.Ct. ___ (1989). This would appear to invalidate the state's current leasing program with respect to its application to Mental Health Trust Lands (However, no new mineral leases have been issued on Mental Health Trust Lands since the Alaska Supreme Court's decision in this case in October of 1985). Interestingly, at footnote 3, the United States Supreme Court specifically acknowledged the difficulty of determining fair market value of minerals, but reaffirmed its previous pronouncements that "whatever the difficulties may be in making such appraisals with complete accuracy, it does not defeat the existence of a "market value" in mineral rights, and it does not suffice as a reason to depart from the ordinary requirements that the law imposes on such transactions.

19. The same is true for mineral properties, but to a lesser extent where the lessee is a "mom and pop" operation which is much more prevalent in mining, particularly placer.

A deeper look at Justice Scalia's position, however, calls into question its validity for Alaska law. Justice Scalia appealed to the common law understanding of the "judicial Power" *at the time of the Constitution's framing*. As Justice Scalia noted, many of the framers adhered to the traditional "find-make" distinction in defining the proper role of the judiciary.[280] If Justice Scalia's historical approach is utilized, we would appeal to the meaning of the phrase "judicial power" at the time of the framing and ratification of the Alaska Constitution. In the time since the framing of the federal Constit[illegible], the "find-make" distinction has been discredited. Indeed, the *Uni[illegible]* Court thoroughly rejected this view when constructing the first modern retroactivity doctrine. Amidst these events, the Alaska Constitution was framed and ratified. In other words, the nature of the judicial role had changed at the time of the framing and ratification of the Alaska Constitution. Thus, a Justice Scalia-like historical argument might actually provide a constitutional basis *in support of* the decisions in *Judd* and *Byayuk*; at the very least, it might suggest that the Alaska "judicial power" is *not* bound up in the outmoded "find-make" conception of the judicial role.

IV. Conclusion

Only one point comes out of this retroactivity discussion: at present, Alaska and federal retroactivity law are not consistent with each other. The republican spirit imbued in our federal system allows Alaska to part ways with federal precedent on this issue. The United States Supreme Court's doctrines announced in *Griffith* and *Beam* may not be appropriate for Alaska in light of the Alaska Supreme Court's subsequent decisions or the Alaska Constitution. Indeed, the Alaska Supreme Court has shown a strong preference for flexibility and ad hoc balancing on the question of retroactivity. If the court chooses to retain this doctrine of flexibility, however, it has a responsibility to address the non-federal bases of this choice, independently justifying this choice to those the decision will most deeply affect: the people of the State of Alaska.

280. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment).

NOTES

THE MENTAL HEALTH LAND TRUST LITIGATION: *STATE V. WEISS* AND ITS AFTERMATH*

I. Introduction

Throughout the past decade in Alaska, the courts and the legislature have served as the battleground for a dispute between mental health patients and the state. This battle involves a considerable portion of the state's land and resources. The dispute arises from the Alaska Mental Health Enabling Act ("AMHEA") of 1956,[1] in which Congress granted the Territory of Alaska one million acres of land to be held in trust to fund Alaska's mental health program. However, in 1978, the Alaska legislature reclassified the lands comprising the mental health trust as general grant lands, to be administered together with other state land holdings.[2] A group of mental health patients brought a class action suit against the state for dissolving the land trust, and in *State v. Weiss*,[3] the Alaska Supreme Court found in favor of these plaintiffs.

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1. Pub. L. No. 84-830, 70 Stat. 709 (1956).
2. 1978 Alaska Sess. Laws ch. 181.
3. 706 P.2d 681 (Alaska 1985).

In *Weiss*, the court ordered that the mental health land trust be reconstituted and remanded the case for other necessary findings.[4] Since the supreme court's 1985 opinion, the legislature has passed four separate acts in attempting to effect a compromise consistent with the *Weiss* holding. The parties to the *Weiss* case have reduced only the most recent of these acts to a proposed settlement agreement. The superior court has not yet ruled on the legal issues raised by the agreement or submitted it to the plaintiff class for approval.[5] Consequently, the court has not yet entered a final order dismissing the suit and the state remains enjoined from taking action that affects title to the trust lands.

This note will clarify the present status of the litigation by analyzing the history of the controversy and the legal issues contained therein. It also aims to identify the parties to the conflict and their respective interests. Finally, it addresses several issues not yet faced by the Alaska Supreme Court, issues that must be settled before the dispute can be successfully resolved.

Part II of this note provides a brief history of the mental health land trust prior to the *Weiss* decision. It discusses the objectives of the AMHEA, as well as the state's role in managing the trust lands. Part III analyzes the *Weiss* decision itself, specifically addressing: (1) the general law regarding breach of fiduciary duty to a public trust, (2) the invalidity of the legislature's actions, (3) the court's remedy, and (4) a footnote in the *Weiss* opinion in which the court refused to address the rights of bona fide purchasers and conveyancees of trust lands. Part IV addresses the legislature's subsequent acts, focusing on chapter 66 of the 1991 Alaska Session Laws, which serves as the current framework for a potential settlement. Part V details the key decisions by the superior court in the *Weiss* case following its remand by the supreme court. The section also discusses the land valuation issues that the courts are likely to face. Finally, Part VI attempts to reconcile the competing interests and emphasizes the need for a timely settlement.

4. *Id.* at 684.

5. Rule 23(c) of the Alaska Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." ALASKA R. CIV. P. 23(c).

II. PRE-*WEISS* HISTORY OF THE MENTAL HEALTH LAND TRUST

A. The Alaska Mental Health Enabling Act

According to a senate report,[6] two factors prompted the enactment of the AMHEA legislation. First, an outdated and inhumane federal statute[7] governed the commitment of the mentally ill in Alaska, even though both the people of Alaska and the United States Congress believed that a mental health program was generally a matter of local concern.[8] Second, Congress desired to "divest the Federal government of its fiscal and functional responsibility for hospitalization and care of the mentally ill in Alaska,"[9] thereby eliminating the inefficiencies in the system under which the mentally ill were treated.

Under the federal statute, the Territory of Alaska committed mentally ill persons found to be "insane person[s] at large" in a jury trial.[10] Those who were adjudicated insane under this procedure, which resembled a criminal trial,[11] were turned over to a United States Marshal.[12] Since there were no facilities at the time for care of the mentally ill in Alaska, the marshal transported the patients to Portland, Oregon for hospitalization. Responsibility for the process was vested in the United States Secretary of the Interior in Washington, D.C., and the federal government bore all of the costs.[13] Since the territorial legislature's hands were tied by the Organic Act of Alaska,[14] which precluded the territorial legislature from changing the laws regarding commitment of the insane, congressional action was necessary to alter this unacceptable treatment of Alaska's mentally ill.

The AMHEA accomplished two broad objectives. First, it gave the Territory of Alaska authority in the field of mental health that was comparable to that of other states and territories in the United States. Under the AMHEA, the Territory of Alaska assumed full responsibility for enacting procedures for commitment, hospitalization and care of its

6. S. REP. NO. 2053, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3637.

7. Act of Jan. 27, 1905, Pub. L. No. 58-26, 33 Stat. 616, 619.

8. *See* S. REP. NO. 2053, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3637, 3639.

9. *Id.*, 1956 U.S.C.C.A.N. at 3638.

10. Act of Jan. 27, 1905, Pub. L. No. 58-26, 33 Stat. 616, 619.

11. S. REP. NO. 2053, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3637, 3638.

12. Act of Jan. 27, 1905, Pub. L. No. 58-26, 33 Stat. 616, 620.

13. S. REP. NO. 2053, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3637, 3638.

14. Pub. L. No. 62-334, 37 Stat. 512 (1912).

mentally ill.[15] Second, the AMHEA authorized grants-in-aid to enable Alaska to meet the financial burden of establishing and administering a mental health program. Under the Act, the territory would gradually assume complete fiscal responsibility for the program, subject to the three grants-in-aid contained in the AMHEA. The first grant awarded 6.5 million dollars for the construction of mental health facilities in Alaska.[16] The second grant authorized appropriations for a total of six million dollars over a ten-year period to assist the territory in developing its program.[17] The third grant consisted of one million acres of the "vacant, unappropriated, and unreserved" public lands of Alaska (the "land grant"), to be selected by the territory within a ten-year period.[18] The AMHEA provided:

> All lands granted . . . under this section, together with the income therefrom and the proceeds from any disposition 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.[19]

At the time of the Act, the territory consisted of 375 million total acres.[20] Thus, even after granting the territory one million of those acres, the federal government owned well over ninety-nine percent of the total acreage in the territory.[21] The land grant seemed to be a logical method of helping Alaska fund its mental health program.

The state of Alaska acquired the territorial rights and duties under the land grant through section 6(k) of the Alaska Statehood Act.[22] That Act provided that "[g]rants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission."[23] Furthermore, the Alaska Constitution directs that "[a]ll provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, *as well as those prescribing the terms or conditions of the grants of lands or other property*, are consented to fully by the State and its people."[24] Thus, the Alaska Constitution also recognizes the state's duties under the AMHEA land grant.

15. Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956).

16. *Id.* § 372(a).

17. *Id.* § 371(a).

18. *Id.* § 202(a).

19. *Id.* § 202(e) (emphasis added).

20. S. Rep. No. 2053, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3637, 3640.

21. *Id.*

22. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 343 (1958).

23. *Id.* at § 6(k).

24. Alaska Const. art. XII, § 13 (emphasis added).

B. The 1978 Redesignation Act

In 1978, Alaska redesignated the mental health trust lands as general grant lands.[25] It is unclear whether the redesignation was simply a statutory recognition of the way the state had been treating the trust lands or a significant deviation from such treatment. A report of the Interim Mental Health Trust Commission ("Commission")[26] summarized the state's administration of the land trust created by the AMHEA:

> [A]fter selecting the most promising income producing potential lands available at the time, the State never actively managed these lands as a trust. There was no effort to protect the corpus from dissipation or to generate maximum income in the interest of the primary beneficiaries. To the contrary and from the beginning, lands were conveyed from the trust at, frequently, less than fair market value and for purposes not allowed in the 1956 [AMHEA] legislation.[27]

If this description was indeed accurate, and the state had already conveyed trust lands at below market value for non-trust-related purposes, there would have been no need for the state to take the 1978 legislative action.[28]

The redesignation Act itself gave no reason for the dissolution of the trust.[29] Whatever the rationale underlying the redesignation, the Act established a Mental Health Fund, which was to receive 1.5 percent of the total receipts derived from the management of state lands during each fiscal year.[30] The income from this fund could be used only to support the state's mental health program. However, the very next Act of the same legislature amended the funding provision to make the transfer of the income from state lands subject to legislative appropriation.[31] This effectively put the funding of the state's mental health program at the discretion of the legislature. These provisions, combined with the

25. 1978 Alaska Sess. Laws ch. 181, § 3.

26. The state legislature established the Commission in 1986 in response to the *Weiss* decision. 1986 Alaska Sess. Laws ch. 132, § 1. *See infra* note 89 and accompanying text. It is noteworthy that the mental health plaintiffs in *Weiss* selected two of the three members of the Commission.

27. Interim Mental Health Trust Commission Final Report, at 1 (December 20, 1989) (on file with *Alaska Law Review*) [hereinafter IMHTC Report].

28. Telephone interview with G. Thomas Koester, Special Assistant Attorney General of Alaska (February 25, 1992).

29. *But see* 1987 Alaska Sess. Laws ch. 48, § 1(a)(6). This Act attributed the state's actions to the "highly desirable location and character of much of the land selected by the state under the [AMHEA]." *Id.* Much of the land was "in and around major population centers" or "suitable for parks and game refuges." *Id.* The state wanted the ability to satisfy municipal entitlements and make placements in parks and game refuges without compensating the trust. *Id.*

30. 1978 Alaska Sess. Laws ch. 181 § 4.

31. 1978 Alaska Sess. Laws ch. 182 § 4.

legislature's subsequent failure to appropriate the requisite 1.5 percent of revenues, violated Congress' intent to create the land trust as part of the AMHEA.

III. THE *WEISS* DECISION

In 1982, Alaskans receiving mental health services brought a class action suit against the state, arguing that the 1978 legislation should be invalidated because it breached the trust established by Congress under the AMHEA. The superior court agreed that the state breached its duties as trustee, but held that the legislation could not be invalidated under current Alaska case law.[32] Both parties appealed to the Alaska Supreme Court.

A. Breach of Trust

The Alaska Supreme Court affirmed the superior court's holding that the State's redesignation of the trust lands was a breach of the trust.[33] In response, the State argued that its provision of sufficient mental health programs fulfilled the state's obligations under the AMHEA. To support its argument, the State cited section 202(e) of the AMHEA, which provided that "proceeds and income shall *first* be applied to meet the necessary expenses of the mental health program of Alaska."[34] The State reasoned that this provision indicated "that Congress did not wish to limit the use of grant lands *exclusively* to mental health programs,"[35] but rather intended the land grant to serve as a guaranteed revenue base.

The court disagreed with this argument, noting that this language only demonstrated Congress' concern that the land might have a value in excess of the necessary mental health care expenditures.[36] Although the case record failed to indicate whether the value of the land did exceed expenditures,[37] the court concluded that it was "irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of

32. Weiss v. State, Case No. 4FA-82-2208 Civil, Memorandum Decision and Order, Superior Court for the State of Alaska, Fourth Judicial District, June 14, 1983.

33. State v. Weiss, 706 P.2d 681, 683 (Alaska 1985).

34. Alaska Mental Health Enabling Act, Pub. L. No. 84-830, § 202(e), 70 Stat. 709, 712 (1956) (emphasis added).

35. *Weiss*, 706 P.2d at 683.

36. *Id.* at 683 n.1.

37. *Id.* at 683 n.1. The record indicated that the state spent over $222,000,000 on mental health care between 1959 and 1982. *Id.* at 682. The record did not provide the corresponding amount of the revenues from the trust lands during that period. *Id.* However, the record did indicate that as of 1973 the state's total expenditures to date amounted to $66,726,176, while the revenues from mental health trust lands totalled $19,555,582. *Id.*

federal land."[38] The court further found that the state had terminated the trust when it removed the land which composed the corpus of the trust.[39] Once the court determined that the state was acting as a trustee, the conclusion followed that the state could not unilaterally terminate the trust without specific authority to do so.[40]

To support its conclusion that the AMHEA created a public trust governed by general trust law principles, the court cited both *Lassen v. Arizona*[41] and *State v. University of Alaska*.[42] *Lassen* involved a grant of lands to be held in trust from the United States to Arizona. The trust was designed to benefit designated public activities, mainly those with educational purposes.[43] The United States Supreme Court noted that the enabling act in question "unequivocally demand[ed] . . . that the trust receive the full value of any lands transferred from it,"[44] and that Congress intended "the grants [to] provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust."[45] In *University of Alaska*, the Alaska Supreme Court interpreted *Lassen* as clarifying that "private trust law principles are to apply to federal land granted to the state for school purposes."[46] In a footnote, the court's opinion emphasized that "[a]t least two courts have specifically concluded that the law of private trusts is applicable to land held by the state in trust for schools."[47]

The *Weiss* court determined that there was no reason to treat federal land grants for mental health purposes any differently than those for educational purposes; the public land trust created by the AMHEA must be governed by *private* trust law principles.[48] In fact, the Supreme Court of Mississippi recently cited the *Weiss* decision as support for applying to

38. *Id.* at 683.

39. *Id.* The court cited the Second Restatement of Trusts, which states that "[a] trust cannot be created unless there is trust property." RESTATEMENT (SECOND) OF TRUSTS § 74 (1959).

40. *Weiss*, 706 P.2d at 683.

41. 385 U.S. 458 (1967).

42. 624 P.2d 807 (Alaska 1981).

43. *Lassen*, 385 U.S. at 460.

44. *Id.* at 466.

45. *Id.* at 467.

46. *University of A*[illegible] P.2d [illegible]

47. *Id.* at 813 n.6 ([illegible] So. 2d 862, 864 (Miss. 1975); State v. Rosenberger, 193 [illegible] 1972)). For further discussion of *University of Alaska*, *see in*[illegible] accompanying text. *See also* Wessells v. State Dep't of Highways, [illegible] 1051 n.34 (Alaska 1977) (stating that the grant by Congress under 48 U.S.C. § 353, which reserved two sections in each Alaska township to support schools, along with its acceptance by the territory, created a trust).

48. *Weiss*, 706 P.2d at 683 n.3.

school land trusts the common law rule prohibiting a trustee from "giving away, appropriating to his own use, or otherwise[] disposing of the corpus of a trust in derogation of the rights of the beneficiaries."[49] Trusts for mental health purposes may be at least as deserving of rigid protection as those for school purposes. Communities may place a greater priority on educational expenditures than mental health expenditures, thus increasing the importance of a mental health trust as a base revenue guarantee.

While there is ample authority supporting this position,[50] a recent Ninth Circuit case indicates that private trust law principles need not always apply. In *Price v. Hawaii*,[51] the court held that section 5(f) of the Hawaii Admission Act ("HAA")[52] did not place common law trustee duties upon the State of Hawaii.[53] Citing, *inter alia*, the Second Restatement of Trusts,[54] the court began its analysis with the text of the HAA itself.[55] The court found that "it would be error to read the word 'public trust' to require that the State adopt any particular method and form of management for the ceded lands."[56] Thus, the state was restricted in the management of the lands only by its own constitution and laws. The court held that Hawaii law gave the state considerably broad authority to manage the property and the income derived from that property; such authority was more extensive than the power which the federal statutory language granted to Arizona in *Lassen*.[57]

49. Hill v. Thompson, 564 So. 2d 1, 6 (Miss. 1989).

50. *See, e.g.*, County of Skamania v. State, 685 P.2d 576 (Wash. 1984); *Lassen*, 385 U.S. 458. For a thorough discussion of whether private trust principles should govern school land trusts, *see* Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797 (1992).

51. 921 F.2d 950 (9th Cir. 1990).

52. Pub. L. No. 86-3, 73 Stat. 4 (1959).

53. *Price*, 921 F.2d at 955.

54. The relevant part of the Second Restatement of Trusts provides that "[t]he nature and extent of the duties and powers of the trustee are determined . . . by the terms of the trust." RESTATEMENT (SECOND) OF TRUSTS § 164 (1959).

55. The HAA provides that:

> The lands . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be *held* by said State as a *public trust* for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be manag[illegible] disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Hawaii Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959) (emphasis added).

56. *Price*, 921 F.2d at 955.

57. *Id.* at 955 (distinguishing Lassen v. Arizona, 385 U.S. 458 (1967)).

Nonetheless, the *Price* decision does not undermine the Alaska Supreme Court's *Weiss* holding. The language of the AMHEA is sufficiently different than that of the HAA to require a different outcome than that in *Price*. The AMHEA states that the lands shall be "administered," not simply "held," as a public trust. Furthermore, the proceeds must first be used solely for the purpose of defraying the necessary expenses of the mental health program. Hawaii has more discretion in applying the income from lands under the HAA, and may apply that income to various purposes. Finally, while the AMHEA gives no deference to the internal laws of the Territory of Alaska, the HAA expressly defers to Hawaii state law.

B. The Invalidity of the 1978 Legislation

After finding that the state breached the trust, the Alaska Supreme Court reversed the superior court's holding that the legislation could not be invalidated.[58] The superior court felt constrained from invalidating the legislation by the decision in *State v. University of Alaska*,[59] but the supreme court determined that the lower court had misinterpreted that case.[60] In *University of Alaska*, the federal government granted 100,000 acres to the state "for the exclusive use and benefit" of the university.[61] Years after the grant, the state included 5,040 acres of the trust land in a state park. The supreme court held that this action did not breach the trust as long as the state compensated the university for the fair value of the land taken.[62] The court inferred that the state intended to compensate the University for the loss of the land, and employed "the well recognized canon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity."[63]

The supreme court in *Weiss* distinguished *University of Alaska* because the *Weiss* litigation did not involve a partial disposition of the trust lands for a specific use.[64] Instead, it involved the removal of the entire corpus from the trust, with no specific use identified for the former trust lands.[65] The court decided that "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

58. *Weiss*, 706 P.2d at 683.

59. 624 P.2d 807 (Alaska 1981); *see supra* notes 42, 46 and accompanying text.

60. *Weiss*, 706 P.2d at 684.

61. *University of Alaska*, 624 P.2d at 811.

62. *Id.* at 816.

63. *Id.*

64. *Weiss*, 706 P.2d at 684.

65. *Id.* at 684.

imposed in *University of Alaska* is not present here."[66] The court reasoned that since the 1978 legislation went beyond the state's powers regarding the trust lands, it must be held invalid.[67]

C. Remedies

After concluding that the state breached the trust and that the redesignation legislation was invalid, the court turned to the issue of remedies, holding that "the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective."[68] The court remanded the case, directing the superior court to make the requisite findings necessary for this reconstitution. The supreme court did, however, offer "guidance" to the superior court. First, all identifiable state lands that were once part of the mental health trust were to be returned to the trust.[69] If exchanges of former trust land had been made, those properties that could be traced to an exchange for mental health trust lands would be included in the trust.[70] For sales of former trust lands, "the trust must be reimbursed for the fair market value at the time of sale."[71] The overall goal of the court's remedy was "to restore the trust to its position just prior to the conveyance effected by the redesignation legislation."[72]

The court provided that the trial court should grant the state a "set-off" for mental health expenditures made by the state since 1978.[73] In other words, if these expenditures exceeded the value of the lands sold, the state need not compensate the trust for such lands when reconstituting the trust.[74] Although a set-off provision of this type may seem inconsistent with private trust law principles that forbid the reduction of the corpus of a trust,[75] the Second Restatement of Trusts states that "[t]he trustee is entitled to indemnity out of the trust estate for expenses properly incurred

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* This set-off provision of the *Weiss* case was later cited by the Alaska Supreme Court in Southwest Region School District v. State Department of Education, 723 P.2d 636, 637 (Alaska 1986), in which general state expenditures on schools were held to offset any deficiency in the school budget funded by the cigarette tax.

74. *Weiss*, 706 P.2d at 684.

75. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 176 (1959) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.").

by him in the administration of the trust."[76] The Tenth Circuit has interpreted this section to provide that "[e]ven though the expenses arose while in breach of the trust, if the trustee has reimbursed the trust fund for any loss that resulted from the breach, administrative expenses are properly recoverable."[77] The court thus allowed the State of New Mexico to set-off administrative expenses, incurred while in breach of a public land trust for a miners' hospital, against its compensation to the trust.[78] To the extent that Alaska's mental health expenditures can be classified as "administrative expenses," set-off may be justified under these private trust law principles.

D. Rights of Bona Fide Purchasers and Conveyancees

A footnote to the *Weiss* opinion is particularly noteworthy in that the court declined to address questions of title held by bona fide purchasers and conveyancees of former trust lands.[79] The court found it "unnecessary" to address those issues at the time.[80] Since then, however, the issues have created considerable uncertainty over title rights and have proved to be a burden on the state's land administration.[81] Perhaps the court declined to address the issue because it believed that conveyancees and bona fide purchasers would be unaffected by the remedy provision of the opinion.[82]

The court's failure to address the rights of bona fide purchasers may be an isolated point; it is unclear how much of the former land belongs to bona fide purchasers. Some land was not really "purchased" from the

76. *Id.* § 244.

77. United States v. New Mexico, 536 F.2d 1324, 1329 (10th Cir. 1976).

78. *Id.* at 1329-30.

79. *Weiss*, 706 P.2d at 684 n.4. A bona fide purchaser is defined as "[o]ne who has purchased property for value without any notice of any defects in the title of the seller." BLACK'S LAW DICTIONARY 177 (6th ed. 1990).

80. *Weiss*, 706 P.2d at 684 n.4.

81. Telephone Interview with G. Thomas Koester, Special Assistant Attorney General of Alaska (October 5, 1992). Thus far, the plaintiffs, when requested to do so by the state, have agreed to modify the superior court's injunction which prevents the state from transferring title of original trust lands to third parties. *See infra* notes 124-133 and accompanying text. This negotiation process has added an additional procedural hurdle for the state.

82. The *Weiss* court noted that transactions with conveyancees and bona fide purchasers might be covered by the following provision: "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." *See Weiss*, 706 P.2d at 684. Thus, if the state has received property of equal value in the exchange, that property will go to the trust, with the bona fide purchaser able to retain title to the former trust lands. The results would be similar where the lands were sold for cash proceeds, except such proceeds would be subject to the state's right of set-off before being transferred to the trust.

state. Municipalities that were simply given the land by the state would be donees of trust property and would thus hold interests inferior to those of the beneficiaries of the trust.[83] Other lands, such as those redesignated by the legislature as state parks or wildlife refuges, would still be in state hands and could be transferred back to the trust.[84]

The most difficult determinations involve individuals who actually purchased former trust land from the state. Since they gave the state value in payment of the lands, they theoretically should be protected by the state's obligation to transfer proceeds of sales to the trust.[85] However, the Second Restatement of Trusts provides that "a transferee of trust property takes subject to the trust if at any time prior to the transfer he has notice that the trustee is committing a breach of trust in making the transfer, although he gives value before he has notice."[86] The Restatement further provides: "A person has notice of a breach of trust if (a) he knows or should know of the breach of trust . . . ."[87] Since the creation of the trust is a matter of public record, a purchaser for value may have difficulty showing the requisite lack of notice to obtain bona fide purchaser status. Thus, if the settlement process deteriorates and litigation ensues, two related issues that would be contested are: (1) whether a constructive notice

83. *See* RESTATEMENT (SECOND) OF TRUSTS § 289 (1959) ("If the trustee in breach of trust transfers trust property and no value is given for the transfer, the transferee does not hold the property free of the trust, although he had no notice of the trust.").

84. The current status of the original mental trust lands is as follows:

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

State's Memorandum in Support of Motion for Summary Judgment with respect to Issues Raised in Environmental Intervenors' Complaint, at 17, Weiss v. State, (No. 4FA-82-2208 Civil) (filed August 27, 1992). Many of the acreage figures are approximations, causing the total shown to be 997,900 acres instead of one million acres.

85. *See supra* note 82 and accompanying text.

86. RESTATEMENT (SECOND) OF TRUSTS § 311 (1959).

87. *Id.* § 297.

standard should be used, and, (2) if so, at what point constructive notice is deemed to have arisen.[88]

IV. THE LEGISLATURE'S RESPONSE

A. The Pre-1991 Acts

The *Weiss* decision did not specify the nature of the state's obligation with respect to managing the trust land. Since the decision in 1985, there have been four legislative acts aimed at effecting a compromise between the mental health plaintiffs and the state. The first act, passed in 1986, created an Interim Mental Health Trust Commission within the Department of Natural Resources ("DNR").[89] The Commission was empowered to approve any conveyance by the Commissioner of Natural Resources, who was given responsibility for the actual management of the trust lands.[90] The Commissioner was also required to inventory the trust lands and audit all transactions involving former trust lands.[91] The 1986 Act also created a special trust account within the state general fund to receive the proceeds from management of the mental health lands.

The act which followed this interim solution, the first actual attempt at a compromise, came in 1987.[92] The statute proposed to reconstitute the trust with lands in state parks and game refuges that had a substantial probability of remaining under state ownership in perpetuity. The state would then compensate the trust each year with eight percent of the fair market value of the former trust lands. This proposed settlement created a problem in that the plaintiffs and the DNR widely differed on the valuation of the trust lands.[93] According to plaintiffs' counsel, the reason for the large discrepancy was the state's inability to compensate the trust

88. For example, the 1978 legislation which removed the land from trust status may not have been considered a breach had the state made the specified appropriations to compensate the trust. It is questionable that a purchaser of former trust lands would be charged with investigating subsequent appropriations. Furthermore, *University of Alaska* could be construed as providing notice that even if a breach existed, monetary damages, rather than the land itself, would be the proper remedy. *See* State v. University of Alaska, 624 P.2d 807 (Alaska 1981). On the other hand, the *Weiss* decision in 1985 likely would be construed as providing sufficient public notice of the breach of the trust to destroy bona fide purchaser status. *See Weiss*, 706 P.2d at 683.

89. 1986 Alaska Sess. Laws ch. 132.

90. *Id.* at § 2d.

91. *Id.* at § 2a.

92. 1987 Alaska Sess. Laws ch. 48, § 25.

93. The plaintiffs' experts valued the trust lands at $2,243,000,000. DNR's designee valued them at approximately $564,700,000. *See* Minority Recommendations of Interim Mental Health Trust Commission, at 28 (February 1, 1990) (on file with *Alaska Law Review*).

for what the lands were actually worth.[94] The Commissioner stated that she was forced to declare an impasse because the Commission failed to use the fair market value in its calculations, making it impossible to satisfy simultaneously the legislative requirements to use fair market value and to adopt the Commission's recommendations.[95] Regardless of its cause, this discrepancy rendered settlement infeasible.

The 1990 compromise effort attempted to alleviate the land valuation problem by removing the required correlation between trust income and land value.[96] The 1990 Act[97] provided that "[a]ll land within legislative designations on September 7, 1987, constitutes the corpus of the mental health land trust."[98] The "rent" from these lands would consist of six percent of the state's unrestricted general fund revenue each fiscal year.[99] This provision, however, was unacceptable to the plaintiffs because the trust would not receive a sufficiently large stream of income.[100]

B. The 1991 Act

Lengthy negotiations between the state and the plaintiffs resulted in chapter 66 of Alaska's 1991 Session Laws.[101] The 1991 Act[102] has two primary features: it reconstitutes the trust with lands as similar as possible to the original trust lands, and it establishes specific procedures which the state must follow in administering the trust. The Act also proposes to return approximately half of the original trust lands while other state lands

94. Telephone Interview with David Walker, Attorney, Law Office of David Walker, and James Gottstein, Attorney, Law Office of James Gottstein (January 9, 1992).

95. Letter from Lennie Gorsuch, Commissioner of Department of Natural Resources, to Thelma Langdon, Chair of Alaska Mental Health Board (April 17, 1990) (on file with *Alaska Law Review*).

96. 1990 Alaska Sess. Laws ch. 210.

97. The terms "1990 Act" and "chapter 210" are used interchangeably throughout this note to refer to chapter 210 of the 1990 Alaska Session Laws.

98. 1990 Alaska Sess. Laws ch. 210, § 4.

99. *Id.* § 2.

100. Since the plaintiffs valued the land at $2,243,000,000, *see supra* note 93, six percent of the general fund revenue fell short of the compensation offered under the 1987 Act (eight percent of the fair market value). The state estimates the total unrestricted general fund revenues for the year ended June 30, 1992 to be $2,199,400,000. Telephone Interview with representative of State of Alaska Department of Revenue, Treasury Division (November 6, 1992). The plaintiffs feared in 1990, as they do today, that general fund revenues will decline as the Prudhoe Bay oil reserves become less productive. Telephone Interview with G. Thomas Koester, Attorney, Law Office of G. Thomas Koester (Sept. 24, 1991).

101. 1991 Alaska Sess. Laws ch. 66.

102. The terms "1991 Act" and "chapter 66" are used interchangeably throughout this note to refer to chapter 66 of the 1991 Alaska Session Laws.

will replace the half of the original trust lands that are now in private hands or subject to use restrictions decreasing their value.

The original lands which the 1991 Act automatically returns to the trust include unencumbered land, land subject to various short-term leases, permits, or contracts which the plaintiffs viewed as income-maximizing, and land in the Haines and Tanana Valley State Forests.[103] The Act authorizes the return of other original land to the trust at the option of the plaintiffs. This land may not include any land that has been conveyed out of state ownership, or any land in legislatively designated state parks, forests, or game refuges (with the exception of the Haines and Tanana Valley State Forests).[104] As compensation for land not returned to the trust, replacement land exchanges are to be negotiated between the plaintiffs and the Commissioner of Natural Resources.[105] The Act requires that such exchanges be "based on equal fair market value"[106] and "involve, as nearly as practicable, land of comparable character."[107] Finally, chapter 66 lists additional factors to be considered when deciding upon the appropriate land to be exchanged, including: diversity of the character of the land, development and income-generating potential, public benefits, benefits to the trust, public interest and the efficiency of land management.[108]

Recognizing that the substitution provision of this proposal surely would cause continued valuation disputes, the 1991 Act gives the Alaska Supreme Court original jurisdiction to rule on all disputes arising from the reconstitution of the trust.[109] As security for compensation, the Act "hypothecates" certain state lands to the mental health trust.[110] Foreclosure on the hypothecated lands would occur upon default of the state's duties or upon failure to reconstitute the trust by December 1, 1994.[111] In addition, the statute calls for contributions from unrestricted

103. *Id.* § 51(1)-(5).

104. *Id.* § 54(5)-(6).

105. *Id.* § 55(f).

106. *Id.* § 55(c).

107. *Id.* § 55(d). Among the factors to be considered in determining comparable character are terrain, use, location, development potential, income potential, accessibility and other physical characteristics. *Id.*

108. *Id.* § 55(e).

109. *Id.* § 57(a).

110. *Id* § 56(a). A complete list of such land is listed in "Lands Hypothecated to the Mental Health Trust, May 1991," located in the Department of Natural Resources office in Anchorage. *Id.* The term "hypothecate" means "[t]o pledge property as security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender, nor is the lender given title to the property; though he has the right to sell the pledged property upon default." BLACK'S LAW DICTIONARY 742 (6th ed. 1990).

111. 1991 Alaska Sess. Laws ch. 66, § 56(d).

state revenues to the mental health trust income account in support of the trust during the transition to a fully developed land management program. Such contributions will follow a sliding scale beginning in 1992 at six percent annually, gradually declining to zero percent by the year 2003.[112]

Chapter 66 also created the Mental Health Trust Authority ("MHTA"), which will act as trustee of the reconstituted trust. The Act also defines the beneficiaries of the trust and explains generally that which a comprehensive mental health program should entail.[113] Lastly, chapter 66 does not take effect until the superior court has dismissed the lawsuit and the time for appeal has expired.[114] The superior court will not dismiss the suit unless it determines that the settlement agreement is in the best interests of the beneficiaries of the trust.[115]

V. THE ROLE OF THE COURTS

A. Superior Court Decisions on Remand

1. *Intervention.* After the Alaska Supreme Court remanded *Weiss* in 1985, the superior court decided several crucial cases impacting the litigation. A 1988 decision[116] involved the designation of trust beneficiaries. The original plaintiff class consisted of those fitting the traditional definition of "mentally ill."[117] Groups consisting of (or representing) mentally retarded and mentally defective individuals and chronic alcohol abusers suffering from psychoses sought intervention as beneficiaries under the AMHEA.[118]

The State argued that it was within their discretion to determine which groups were to be served by the mental health program and thus benefit from the mental health lands trust. According to the State, this interpretation was consistent with the AMHEA's initial grant of plenary authority to the Territory of Alaska over its own mental health program. The original plaintiff class joined in the State's argument in order to maintain the small size of the beneficiary class. The intervenors countered that the AMHEA's legislative history demonstrated an intent to fund a program with a broad beneficiary base.

The court allowed the plaintiffs' intervention as beneficiaries, rendering a broad interpretation of the class of intended beneficiaries. While acknowledging "support for the position taken by each of the parties,"[119] the court concluded that:

> Congress intended that the mental health lands public trust benefit the recipients of the services of the comprehensive mental health program, which group must include, at a minimum, the mentally ill who may require hospitalization, and the mentally defective and retarded. The court concludes that it is within the discretion of the State to include other groups as recipients of services by the mental health program but it is not within the discretion of the State to exclude either of those two groups.[120]

An additional intervention issue arose subsequent to the 1991 legislation, when the Sierra Club Legal Defense Fund filed a motion for intervention on behalf of eight environmental groups. The Defense Fund sought to challenge the concept of a settlement based on chapter 66.[121] After the settlement agreement was submitted to the court for preliminary approval, the environmentalists raised specific objections to the agreement.[122]

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112. *Id.* § 11(c).

113. *Id.* § 26 (to be codified at ALASKA STAT. § 47.30.056(b)). The beneficiaries are to include:

(1) the mentally ill;
(2) the mentally defective and retarded;
(3) chronic alcoholics suffering from psychosis;
(4) senile people who as a result of their senility suffer major mental illness; and
(5) other persons needing mental health services, as the legislature may determine.

Id. The "comprehensive" mental health program should include "services for the mentally ill, community mental health services, services for the developmentally disabled, alcoholism services, and services for children, youth, adults, and seniors with mental disorders." *Id.*

114. *Id.* § 58.

115. *See supra* note 5.

116. Weiss v. State, Case No. 4FA-82-2208 Civil, Memorandum Decision and Order, Superior Court for the State of Alaska, Fourth Judicial District, April 27, 1988 [hereinafter April 27, 1988 Weiss Memorandum Decision].

117. As later defined in chapter 66, the "mentally ill" includes people with schizophrenia, delusional disorders, mood disorders, anxiety disorders, somatophorm disorders, organic mental disorders, personality disorders and dissociative disorders. 1991 Alaska Sess. Laws ch. 66, § 26 (to be codified at ALASKA STAT. § 47.30.056(d)).

118. April 27, 1988 Weiss Memorandum Decision, *supra* note 116, at 2-3.

119. *Id.*

120. *Id.* at 17.

121. Complaint of Intervenors, Weiss v. State (No. 4FA-82-2208 Civil) (lodged October 26, 1991) [hereinafter Complaint of Intervenors]. The Complaint was filed as of the granting of intervention on December 3, 1991. While the terms "environmentalists" and "environmental intervenors" are used in this note to refer generally to the parties being represented by the Sierra Club Legal Defense Fund, the intervenors are: 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.

122. *See infra* Part VI.C. for an analysis of the issues presented by the environmental intervenors and their impact on the settlement.

2. *Lis Pendens.* In July 1990, the superior court allowed plaintiffs to file a re-notice of lis pendens[123] or former trust property and enjoined the state from transferring title to third parties pending the outcome of the *Weiss* litigation.[124] The court cited three factors to be weighed in ruling on a preliminary injunction: (1) whether the party requesting the injunction faces irreparable harm, (2) whether adequate protection exists for the party opposing the injunction, and (3) whether the proponent of the injunction has raised substantial questions as to the merits of the case.[125]

The State argued that the provisions of the 1990 Act[126] remedied the state's breach of its fiduciary duty to the trust by providing adequate compensation to the beneficiaries.[127] The State also urged that the plaintiffs' sole remedy should be payment of compensation rather than reconstitution of the trust. Judge Greene found that "[t]he fallacy of these arguments is that they ignore the fact that the state may not unilaterally settle this lawsuit."[128] Furthermore, under the supreme court's *Weiss* decision, a compensation remedy for the original breach was not adequate. Judge Greene therefore concluded that "[t]his lawsuit will not come to its conclusion until a final adjudication on the merits reconstituting the trust

123. "Lis pendens" is defined as: "Jurisdiction, power, or control which courts acquire over property in litigation pending action and until final judgment." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). "Notice of lis pendens" is further defined as "[a] notice filed on public records for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment. The notice is for the purpose of preserving rights pending litigation." *Id.* (citing Mitchell v. Federal Land Bank of St. Louis, 174 S.W.2d 671, 674 (Ark. 1943)). Black's further states that "while it is simply a notice of pending litigation the *effect* thereof on the owner of property is constraining." *Id.* (citing Beefy King Int'l, Inc. v. Veigle, 464 F.2d 1102, 1104 (5th Cir. 1972)).

> Alaska has codified its lis pendens doctrine at Alaska Statutes section 09.45.790:
> In an action affecting the title to or the right of possession of real property, the plaintiff . . . may record in the office of the recorder of the recording district in which the property is situated a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property affected in that district. From the time of filing the notice for record, a purchaser, holder of a contract or option to purchase, or encumbrancer of the property affected has constructive notice of the pendency of the action and of its pendency against parties designated by their real names.

ALASKA STAT. § 09.45.790 (Supp. 1991).

124. Weiss v. State, Case No. 4FA-82-2208 Civil, Memorandum Decision and Order, at 13, Superior Court for the State of Alaska, Fourth Judicial District, July 12, 1990 [hereinafter July 12, 1990 Weiss Memorandum Decision]. Notices of lis pendens were originally filed in August, 1984 but subsequently expunged from the land records in November, 1984.

125. *Id.* at 7.

126. *See supra* note 96 and accompanying text for a further discussion of chapter 210 of the 1990 session laws.

127. July 12, 1990 Weiss Memorandum Decision, *supra* note 124, at 8.

128. *Id.*

is reached or a bilateral settlement is reached which is approved by the court under the provisions of Alaska [Rule of Civil Procedure] 23(e)."[129]

Judge Greene also refused to grant the state an injunction "barring the plaintiffs from challenging title to any mental health lands, filing lis pendens as to such lands, or taking any other action which would cas[t] a legal cloud on the current record title to such lands."[130] While the decision denied the state's request for injunction, a footnote to the memorandum decision and order acknowledged the possible adverse effects of such a denial on third parties:

> The court is not unmindful of nor unsympathetic to the problems which may be created for third-party holders of lands originally designated as mental health trust lands. It is very possible that innocent third-parties will have their rights to those lands tied up in court for a period of time. There is no question that such actions may be harmful to individuals. However, it must be stressed that the problem arises not because of actions of plaintiffs or this court but because of the actions of the State in violating its trust responsibilities when it redesignated mental health trust lands as general grant lands in 1978. Had the legislature taken its trust obligation seriously, these innocent third-parties would not have been adversely affected.[131]

Judge Greene further observed that "[t]hese lands are clearly income-producing properties which could be managed to produce long term income for the trust itself,"[132] and that "since the legislature's repeal of the statute creating the Interim Mental Health Trust Commission, there is no other way to protect the lands other than through court action."[133]

B. Valuation Issues

Any proposal calling for full reconstitution of the trust, whether by substituted lands or by cash, will inevitably involve valuation disputes. Given the unsuccessful history of past valuation attempts,[134] it is likely that the Alaska Supreme Court will be called upon to resolve these disputes. When future disputes come before the court, it would be wise to keep in mind the source of the entire dispute: the state's unilateral disregard for the trust which Congress created for the benefit of Alaska's mental health program. Since a chapter 66-based settlement accommodates

129. *Id.* at 8-9. As further justification, the decision stated that "where an appellate court issues a specific mandate, a trial court has no authority to deviate from it." *Id.* at 9.

130. *Id.* at 9.

131. *Id.* at 11 n.3.

132. *Id.* at 13.

133. *Id.*

134. *See supra* notes 93-95 and accompanying text.

the state by failing to require the return of lands conveyed from the trust, the plaintiffs should be entitled to very careful scrutiny of substituted lands.

The number of potential valuation disputes might be greatly reduced if the supreme court were to decide on acceptable valuation methods early in the post-settlement reconstitution process. Disagreement over such methods was one of the principal causes of the failure to settle under the 1987 legislation. The DNR urged that a "comparable-sales" method should be used to determine the fair market value for all lands. Meanwhile, though the Attorney General's office suggested that the "income-capitalization" method was legitimate, it claimed that the data relied upon by the plaintiffs' experts was inadequate with respect to actual mineral endowments, the timing of successful operations, and worldwide markets. The Commission adopted the view put forth by the plaintiffs, who argued that an income-capitalization approach, whereby the land's value is calculated based on the projected income stream it will produce, more accurately captured the true fair market value of the mineral reserves. In the settling plaintiffs' view, since lands containing mineral reserves comprise the bulk of the trust's value, the determination of the proper appraisal method will have a crucial impact on the value of the reconstituted trust.

The proper valuation method depends upon the type of land under consideration. The income-capitalization method is more appropriate for income-producing lands such as those containing mineral deposits. The trust likely would derive income from leases of the mineral rights or joint venture mining projects, rather than from the outright sale of these lands. In contrast, a comparable-sales approach does seem more appropriate for those urban and suburban lands likely to be sold for commercial development. Thus, the proper appraisal method should be tied to the characteristics of a specific parcel of land and the trust's anticipated method for deriving income from such land.[135]

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135. The DNR's position, as evidenced by the Minority Recommendations of the Interim Mental Health Trust Commission, raises several important points. First, to prevent double-counting in the valuation process, each acre of land should be valued according to only *one* anticipated land use. The plaintiffs justify such double-counting because the surrounding land will increase in value to compensate for loss of some surface land in places where mining or drilling occurs. Telephone Interview with James Gottstein, Attorney, Law Office of James Gottstein (February 24, 1992).

Also, it may be inaccurate to calculate the present value of income streams from mineral rights using the present date as the target. It would be more accurate to calculate such present values as of the date of anticipated development. However, the plaintiffs could counter with the argument that "[s]ome speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas or otherwise." United States v. Silver Queen Mining Co., 285 F.2d 506, 510 (10th Cir. 1960). In United States v. 22.80 Acres of Land in San Benito County, 839 F.2d 1362 (9th Cir. 1988), the Ninth Circuit cited *Silver Queen* in refusing to reverse the district court's approval of an appraisal methodology where a discount factor was not applied.

VI. Assessing the Proposed Settlements

A. The Plaintiffs' Interests

The settlement alternatives seem to be land-based, cash-based, or some combination of the two. The chapter 66 compromise provides primarily a land-based settlement. Since a lump-sum cash settlement would be impossibly expensive at this time, any cash-based settlement would have to include continuing annual appropriations from the legislature to reconstitute the trust, in addition to those annual appropriations already made to fund the mental health program. According to the lead plaintiffs' attorney who negotiated chapter 66 with the legislature, the Hickel Administration will veto any reconstitution of the trust based on continued general fund support.[136] Thus, the practical parameters of a settlement seem limited to that which reconstitutes the trust with land.

A reconstituted land trust benefits the plaintiffs because it provides a higher degree of permanence than legislative appropriations. Thus, while it may be unlikely that a reconstituted land trust will generate enough revenues to fund fully a comprehensive mental health program in the future, it would provide an important permanent base guarantee.

When Congress created the original trust under the AMHEA, it clearly envisioned a *land* trust. In order to provide security and longevity comparable to that of a land trust, any alternative would require a great deal of cash up-front, which seems unlikely to occur. Additionally, the legislative history of the AMHEA suggests that if income from the land trust were not enough to sustain a comprehensive mental health program, the state would be obligated to supplement the trust revenues.[137] However, the state, arguing that the AMHEA was only meant to place the

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136. Telephone interview with David T. Walker, Attorney, Law Office of David T. Walker (Jan. 9, 1992). According to Mr. Walker, the administration does, however, recognize that additional expenditures may be necessary to supplement the income from a land-based trust. *Id.*

137. *See, e.g.*, Letter from Wesley A. D'Ewart, Assistant Secretary of the Interior, to Senator James E. Murray, Chairman, Committee on Interior and Insular Affairs (January 9, 1956), *reprinted in* 1956 U.S.C.C.A.N. at 3645. The AMHEA "would have the effect of transferring to the Territory responsibility for the administration of the Territory's mental health program." *Id.* at 3646. "The revenues obtained from this land grant shall *materially assist* the Territory in assuming full financial responsibility for the care and treatment of the mentally ill." *Id.* (emphasis added). This implies the understanding that part of the Territory's responsibility would be to support the mental health program beyond the "material assistance" provided by the land grant. D'Ewart recognized that "[i]t 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." *Id.* at 3647.

territory on equal footing with other states, would contest an interpretation *compelling* it to make any appropriations.

Chapter 66 eliminates the set-off provision contained in the *Weiss* opinion, and this aspect of the 1991 Act is extremely beneficial for the plaintiffs. The *Weiss* opinion provided that the amount by which mental health expenditures exceeded income from the trust lands could be set-off against the reimbursement required for trust land that had been sold.[138] Since expenditures could conceivably exceed trust land income, it is possible that the trust would not be compensated at all for lands that were sold. Because chapter 66 eliminates this provision, the new trust will in fact contain land equal in value to the original lands. Although the plaintiffs are confident that they would prevail in any litigation aimed at restoring land title to the trust,[139] they could not achieve the particular benefits of chapter 66 by continued litigation of the dispute.

Those plaintiffs opposing the chapter 66-based settlement do so for several reasons.[140] First, chapter 66 charges the MHTA, rather than the state, with the trustee's role of managing the lands for profit. This scheme differs from that originally created by the AMHEA, which envisioned the state acting as trustee. The state, however, was derelict in its duties as original trustee.[141] One argument against the new arrangement is that if the MHTA bears the trustee expenses, the ultimate cash flow to the beneficiaries could decrease. A counterargument can be made that additional revenues will be generated because the body managing the trust lands clearly has the beneficiaries' best interests in mind and that this will compensate for any additional trustee expenses passed on to the beneficiaries. Furthermore, even if the state acts as trustee, if private trust law were applied, the state would be entitled to indemnification by the trust for expenses incurred as trustee.[142] In other words, the ultimate cash flow to the beneficiaries could decrease under the original arrangement as well.

138. State v. Weiss, 706 P.2d 681, 684 (Alaska 1985).

139. Telephone Interview with James B. Gottstein, Attorney, Law Office of James B. Gottstein, and David T. Walker, Attorney, Law Office of David T. Walker (Jan. 9, 1992).

140. Currently, the only plaintiffs that oppose the settlement are the chronic alcoholics suffering from psychoses, represented by Philip Volland. Mr. Volland, who initially adopted a "wait and see" attitude toward the settlement and raised many of the concerns outlined in the text, is now firmly opposed to the current settlement agreement. Telephone Interview with Philip R. Volland, Attorney, Rice, Volland, and Gleason (Jan. 9, 1992), subsequent interview (March 19, 1992).

141. *See* IMHTC Report, *supra* note 27, at 6.

142. RESTATEMENT (SECOND) OF TRUSTS § 244 (1959) ("The trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust.").

The dissenting plaintiffs also object to the chapter 66 provisions because a cash-based settlement would be easier to administer than a land-based settlement. According to this rationale, the additional delays inherent in reconstituting a land trust and the possibility of continuous litigation to defend the trust's title to lands more than offset the "security" of a reconstituted land trust. Although the state does not seem to be willing and/or able to provide such a settlement,[143] the dissenting plaintiffs' argument is compelling in light of the threat to the settlement posed by the environmentalist intervenors.[144] Substitutions will definitely create problems, especially if the state does not return to the trust former trust lands owned by municipalities or within state parks and refuges.[145] Furthermore, most of the valuable land in the state has been designated for specific uses since statehood, so choosing replacement lands with sufficiently high value is likely to be an arduous task. Even if the trust were to be successfully *reconstituted* with land, subsequent problems are likely to arise in *administering* the land-based trust.

B. The State's Interests

The state's primary constraint in negotiating a settlement is a lack of cash funds with which to compensate the trust. Beyond this, the state has an interest in reducing its involvement in costly and time-consuming litigation with respect to the trust.[146] The state hopes to manage the trust lands at their highest and best use, consistent with the legislature's broad authority over all state land under the Alaska Constitution.[147] However, such powers do not necessarily extend to lands contained in the federally created land trust.[148] To the extent the state has already given trust lands to municipalities or native corporations organized under the Alaska Native

143. *See supra* note 136 and accompanying text.

144. *See infra* Part VI.C.

145. Chapter 66 does not provide for the return of these lands to the trust. 1991 Alaska Sess. Laws ch. 66, §§ 54-55.

146. *See, e.g.*, 1991 Alaska Sess. Laws ch. 96, § 85 (appropriating $500,000 from the mental health trust income account in the general fund to the Department of Law to pay costs associated with the *Weiss* litigation for the fiscal year ending June 30, 1991). The state is currently paying the plaintiffs' attorney's fees, and the continuation of this practice has led at least one observer to refer to chapter 66 as a "lawyer's full employment act." Interview with Philip R. Volland, Attorney, Rice, Volland, and Gleason (March 19, 1992).

147. ALASKA CONST. art VIII, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.").

148. *University of Alaska* held that, despite article VIII, section 2 of the Alaska Constitution, the state could only remove trust land if it compensated the trust for the fair market value of the land removed. State v. University of Alaska, 624 P.2d 807, 815-16 (Alaska 1991).

Claims Settlement Act ("ANCSA"),[149] the state vehemently opposes invalidating such conveyances.[150] Likewise, the state wants to prevent the invalidation of legislative designations of former trust lands as state parks or wildlife refuges.

The current uncertainty over title to former trust lands is the primary incentive for the state to reach a settlement. As a result of the July 1990 injunction[151] and public notice of the trust's claim to former trust lands, it has been difficult to sell trust land purchased from the state. Furthermore, those who have purchased these trust lands cannot obtain patents[152] from the state, and projects such as the Wishbone Hill coal mine have been delayed.[153] The injunction, coupled with confusion over title, gives the state sufficient incentive to relinquish its set-off right in order to reach an agreement with the plaintiffs.

C. The Environmentalist Intervenors' Interests

The intervention by eight environmental groups creates potential problems for the current proposed settlement agreement. The environmentalists' claims can be classified in two general categories. The first involves the agreement's disregard for Alaska's public land management policies; the second concerns the legislative process involved in passing chapter 66.[154]

1. *Public Land Management Issues.* The settlement has been attacked on constitutional grounds, based on article VIII, section 10 of the Alaska Constitution.[155] The constitution requires public hearings and, arguably, a best-interests determination before lands may be transferred to *out-of-state ownership.*[156] This restriction applies to such transfer only if the MHTA is *not* designated a state entity. If the MHTA *is* designated a state entity, the transfer would not be considered out-of-state ownership. Because the MHTA is managing lands to maximize income for selected beneficiaries (as opposed to the state), and since it is arguably not subject to public scrutiny, the MHTA may be classified as something other than a state entity.[157] Thus, transfers of state land to MHTA may be subject to this constitutional provision.[158]

Alaska Statutes sections 38.04 and 38.05 contain the state's principal safeguards of the public interest, as required by article VIII, section 10 of the Alaska Constitution.[159] In addition to requiring a public hearing,[160] these sections also require land use planning and classification,[161] multiple purpose use of state land,[162] and reservation of public rights of access to public water and public land.[163] Chapter 66 exempts the MHTA from all of these requirements except public notice.[164] The environmentalists claim that this exemption violates article IX, section 15 of the Alaska Constitution[165] and Alaska Statutes section 37.13.010[166]

149. *See* 43 U.S.C. § 1601 *et seq.* (1988).

150. It is unlikely that former trust lands which have been conveyed to native corporations organized under ANCSA can be returned to the trust. *See* Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237 (9th Cir. 1988) (holding that to the extent mental health trust lands have not yet been patented to the State by the Secretary of the Interior as required by the Alaska Statehood Act, they are withdrawn from appropriation under the public land law) (citing 43 U.S.C. § 1610(a) (1988)).

151. *See supra* note 124 and accompanying text.

152. A "patent," in this context, refers to "[t]he instrument by which a state or government grants public lands to an individual." BLACK'S LAW DICTIONARY 1125 (6th ed. 1990).

153. The Wishbone Hill coal mine is a proposed surface coal mine located in the Matanuska River valley near Palmer. The state has been prohibited from issuing a surface coal mining permit to Idemitsu Alaska, Inc., the project's developer, by the superior court's preliminary injunction issued July 9, 1990. *See supra* note 124 and accompanying text. The superior court denied Idemitsu's subsequent motion to modify this preliminary injunction. Weiss v. State, Case No. 4FA-82-2208 Civil, Memorandum Decision and Order, Superior Court for the State of Alaska, Fourth Judicial District, April 15, 1991.

154. The material in this section traces the 11 counts set out in the Complaint of Intervenors, *supra* note 121.

155. ALASKA CONST. art. VIII, § 10.

156. *Id.* ("No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law").

157. Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986), addressed whether the Bank ("CFAB") is a "state agency" for the purpose of maritime lien foreclosure proceedings. The Alaska Supreme Court stated that it does not address the status of purported state agencies "in the abstract," but rather "consider[s] the entity's status solely for the narrow purposes necessary to that litigation." *Id.* at 708-09. In making the determination, the court will "balance an entity's autonomy against the state's retained control." *Id.* at 711.

158. Section 10 of chapter 66 requires the MHTA to give public notice in the manner provided under Alaska Statutes sections 38.05.945(b) and (c). 1991 Alaska Sess. Laws ch. 66, § 10; ALASKA STAT. §§ 38.05.945(b), (c) (1989).

159. ALASKA STAT. §§ 38.04.005-.910, 38.05.005-.990 (1989).

160. ALASKA STAT. § 38.05.946 (1989).

161. ALASKA STAT. § 38.04.005-.910 (1989).

162. *See, e.g.*, ALASKA STAT. §§ 38.04.065(b), 38.04.910(5), 38.05.285 (1989).

163. ALASKA STAT. §§ 38.04.055 (1989). Forest plans must take into account protection of fish and wildlife habitats, wetlands, water quality and soils. *Id.* § 41.17.230. The statutes also require appraisals of land before disposal, *id.* § 38.05.840, as well as reservations of rights to the state in connection with sales and leases. *Id.* § 38.05.125.

164. 1991 Alaska Sess. Laws ch. 66, § 10 (codified at ALASKA STAT. § 37.14.009 (Supp. 1991)).

165. ALASKA CONST. art. IX, § 15 ("At least twenty-five per cent of all mineral lease rentals, royalties, [and] royalty sale proceeds . . . received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent

by not requiring any deposit of trust income to the general funds until the needs of the mental health program have been met.[167]

The intervenors argue that under both the Alaska Constitution and the common law, the state is viewed as a trustee of the state's public lands and resources for the benefit of all citizens. This argument is grounded in both the state's general authority under article VIII, section 2[168] and the "common use" clause in article VIII, section 3 of the Alaska Constitution.[169] Alaska case law has clarified these constitutional provisions.

In *Herscher v. State Department of Commerce*,[170] the Alaska Supreme Court referred to the state as "trustee of the natural resources for the benefit of its citizens."[171] In a similar context, the court had previously described migrating schools of fish in inland waters as being "held in trust for the benefit of all the people of the state."[172] The court's discussion of the "common use" clause in *Owsichek v. State Guide Licensing & Control Board*[173] indicates that the clause itself is firmly grounded in common law.[174] The *Owsichek* decision cites[175] as leading cases in this area the United States Supreme Court's late nineteenth century decisions in both *Geer v. Connecticut*[176] and *Illinois Central Railroad v. Illinois*.[177] The *Owsichek* court stated that "[i]n light of this historical

fund investments.").

166. ALASKA STAT. § 38.05.945(g) (1989) (requiring fifty percent of all mineral lease rentals and royalties and fifty percent of net profit shares from oil and gas leases to be deposited in the Permanent Fund).

167. 1991 Alaska Sess. Laws ch. 66, § 10.

168. ALASKA CONST. art. VIII, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.").

169. *Id.* § 3 ("Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use.").

170. 568 P.2d 996 (Alaska 1977).

171. *Id.* at 1003.

172. Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *vacated*, 369 U.S. 45, *aff'd*, 369 U.S. 60 (1962).

173. 763 P.2d 488 (Alaska 1988).

174. *Id.* at 494-96.

175. *Id.*

176. 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). In *Geer*, the Supreme Court had previously held that a state's control over its wildlife is to be exercised "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Geer*, 161 U.S. at 529. However, the *Hughes* Court noted that "[t]he *Geer* analysis has . . . been eroded to the point of virtual extinction in cases involving regulation of animals." *Hughes*, 441 U.S. at 331.

177. 146 U.S. 387 (1892). In the context of a public trust in navigable waters, the Court held that "[t]he State can no more abdicate its trust over property in which the

review we conclude that the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."[178]

These objections to the settlement fail to recognize several fundamental aspects of the dispute. The original trust lands which the state will be returning to the MHTA were never truly state lands to be managed for the benefit of the state's *entire* population. Instead, they were only to be managed by the state as trustee for the mental health trust beneficiaries. They are in state hands now only due to the state's derogation of its trustee duties under the original grant from Congress. Similarly, the substituted lands are transferred only to compensate the trust for the state's breach of its fiduciary duty.

Since, according to the settling plaintiffs, much of the value of the former trust lands still within the state's possession lies in mineral rights, an attack based on section 6(i) of the Alaska Statehood Act could jeopardize the settlement. Section 6(i) provides:

> The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented . . . .[179]

It also provides that a breach of this provision results in forfeiture of the mineral lands to the United States, upon the initiation of appropriate proceedings by the Attorney General in the United States District Court for the District of Alaska.[180] This provision presents a two-pronged problem. First, if the MHTA is held to be a private party, the initial transfer of the mineral rights from the DNR could result in forfeiture. Second, if the MHTA is construed as a public body, any conveyance or lease from the MHTA to a private party in the course of the MHTA's profit-seeking land management could result in forfeiture.

However, the clear text of the Alaska Statehood Act[181] could defeat an attack against the settlement under section 6(i). Section 6(i) explicitly refers only to grants made to the State under sections 6(a) and 6(b) of the Act. The grant under the AMHEA was incorporated into the Act under

whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453. The Alaska Supreme Court referred to *Illinois Central Railroad* as "the lodestar of American public trust law." *Owsichek*, 763 P.2d at 496.

178. *Owsichek*, 763 P.2d at 496.

179. Alaska Statehood Act, Pub. L. No. 85-508, § 6(i), 72 Stat. 339, 342 (1958).

180. *Id.*

181. *See supra* note 177 and accompanying text.

section 6(k),[182] and thus, section 6(i) should not apply to the mental health trust lands.

Such attacks could also be defended based upon the principles announced in *State v. Lewis*.[183] This case held that only legislative approval is necessary once Congress has consented to release the section 6(i) restrictions.[184] Such congressional consent with respect to the reconstitution of the mental health trust can be inferred by the AMHEA's provision that the original land grant expressly included mineral rights.[185] Since Congress firmly intended that the AMHEA establish a trust to support Alaska's mental health program, Congress likely would approve the return of land which would have remained in the trust if not for the unauthorized actions of the trustee.

The Supremacy Clause of the United States Constitution also supports the settling parties' counterarguments. The Constitution indicates that the AMHEA should supersede Alaska's statutory and constitutional safeguards.[186] The Alaska Supreme Court has stated that "we must, when possible, construe statutory provisions in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm."[187] However, the Supremacy Clause argument is more effective with respect to the original trust lands than to substitution lands, which have never been a part of the congressionally created trust. In this respect, a settlement which replaces former trust lands with cash -- rather than other lands subject to protection under Alaska law -- may be preferable in that it would avoid the more difficult constitutional questions.

2. *Legislative Process Issues.* In addition to the objection based on the substantive land management provisions of chapter 66, the intervenors also object to the process by which the legislature passed the bill. These arguments have a basis in the Alaska Constitution.

182. *See supra* note 22 and accompanying text.

183. 559 P.2d 630 (Alaska 1977), *appeal dismissed*, 432 U.S. 901 (1977).

184. *Id.* at 642.

185. Pub. L. No. 84-830, § 202(c), 70 Stat. 709, 711 (1956) ("All grants made or confirmed under this section shall include mineral deposits . . . .").

186. U.S. CONST. art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.").

187. Hammond v. Hoffbeck, 627 P.2d 1052, 1059 (Alaska 1981) (citing 2A C. Sands, SUTHERLAND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973); Bouchor v. Engstrom, 528 P.2d 456, 462 (Alaska 1974)).

The intervenors assert a violation of article II, section 13 of the Alaska Constitution.[188] The relevant portion of section 13 states that "[b]ills for appropriations shall be confined to appropriations."[189] The intervenors reason that chapter 66 makes an appropriation by conveying lands that may be used for mental health purposes without any further action by the legislature. Thus, it violates section 13 because it accomplishes other purposes in addition to the appropriation. The state counters by arguing that the term "appropriation" in this context should be construed to refer to a setting aside of a certain amount of money, but not of land, for a specified purpose.[190]

The intervenors also argue that chapter 66 violates article II, section 14, which provides that "[n]o bill may become law unless it has passed three readings in each house on three separate days."[191] The purpose of this language is to ensure that the legislature knows what it is passing.[192] The environmentalists argue that because the legislators did not have access to the list of hypothecated lands at the time they passed the bill, they technically did not "read" the bill.[193] The State counters that the legislature knew what it was enacting and that the incorporation by reference of the hypothecated lands list was perfectly consistent with the constitutional requirements.

The environmentalists are particularly concerned with the hypothecated land list because it includes over four million acres of the state's most valuable land. They argue that hypothecating the lands as security was a conveyance of land interests without reasonable safeguards of the public interest as required by article VIII, section 10. The environmentalists further allege that by incorporating the hypothecated lands list that neither the legislature nor the public had seen, the legislature effectively delegated its legislative powers to DNR and the plaintiffs.[194] They feel that this aspect of chapter 66 provides insufficient procedural safeguards for the public and insufficient substantive standards for DNR and the plaintiffs.[195]

188. Complaint of Intervenors, *supra* note 152, at 21.

189. ALASKA CONST. art. II, § 13.

190. The state relies on Thomas v. Rosen, 569 P.2d 793 (Alaska 1977), which interpreted "appropriation" as the term is used in article II, section 13 of the Alaska Constitution, providing that the governor may, by veto, "strike or reduce items in appropriation bills." ALASKA CONST. art II, § 13.

191. ALASKA CONST. art. II, § 14.

192. *See* North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

193. Complaint of Intervenors, *supra* note 152, at 2.

194. *Id.* at 2.

195. *Id.*

Ironically, a majority of the *Weiss* plaintiffs, as well as the state, believes that the participation of the environmental intervenors will ultimately benefit the settlement process.[196] The superior court's eventual ruling on a settlement proposal will likely be appealed to the Alaska Supreme Court. If the supreme court were to approve a settlement based on chapter 66 -- over the objections raised by the intervenors -- it would provide res judicata and collateral estoppel grounds on which the MHTA could defend conveyances of trust lands in the future. Thus, that which acts as a current impediment to a settlement process could eventually provide long-term efficiencies that benefit the named parties involved.

VII. Conclusion: Reconciling the Interests

One unequivocal fact looms over the *Weiss* litigation: there is a need for timely settlement and final adjudication. The interests of both the plaintiffs and the state would best be served by prompt resolution of the dispute. The chapter 66-based settlement relieves the state from making burdensome cash payments to compensate the trust for the unreturned land. By not forcing the return of land conveyed to municipalities and native corporations, this settlement also reconciles the public interest with the plaintiffs' desire to have a reconstituted trust that resembles the original.

A threshold concern will be the validity of the environmentalists' objections. Final adjudication on these issues seems distant; all parties are likely to exhaust their rights of appeal. Even if these issues are eventually resolved in favor of the state and the settling plaintiffs, notice to the class, subsequent receipt of the class's comments, and an eventual fairness hearing will further delay final adjudication.[197] Once final adjudication occurs, the process of reconstituting the trust with land will surely prove lengthy and complex, although the settling plaintiffs' counsel is already working on developing this process. Under the express terms of chapter 66, the trust must be fully reconstituted by December 1, 1994 (which falls within the last week of the Hickel Administration's tenure of office), or else the plaintiffs may foreclose upon the hypothecated lands.

An alternative approach, advocated by the dissenting plaintiffs as well as the environmental intervenors, involves a solution similar to chapter 210

196. Telephone Interview with James Gottstein, Attorney, Law Office of James Gottstein, and David Walker, Attorney, Law Office of David Walker (Jan. 9, 1992).

197. Philip Volland points out three potential problems with this process: (1) the inherent incompetency of the class, (2) its statewide distribution requiring broad public notice, and (3) the complexity of the settlement agreement. Mr. Volland suggests that a special master be appointed to collect and summarize comments. Interview with Philip R. Volland, Attorney, Rice, Volland, and Gleason (March 19, 1992).

of the 1990 Alaska Session Laws.[198] Such a plan would retain those original mental health trust lands which are still in the trust. In addition, it would call for the state to devote six percent of the general fund budget annually to mental health programs. A final component would, as proposed in chapter 66, create the MHTA to prioritize the funding of programs, thereby removing responsibility from the legislature.[199]

There are several obstacles to such a plan. First, the Hickel Administration rejected such a plan last year due largely to the annual burden that it would place on the general fund. The administration prefers to compensate the trust with land. The Hickel Administration also opposes the designation to the MHTA of the legislature's and governor's discretion over the prioritization of expenditures in the absence of a land-based trust.[200] In addition, the majority of the plaintiffs are fearful of losing the potential for a windfall that would result from discoveries of oil or mineral reserves on trust lands.[201]

The superior court should expedite the schedule for the case on remand to whatever extent possible, given the twin necessities of briefing fully the complex issues involved and writing opinions as bases for subsequent appeals. For a chapter 66-based settlement to work, time is of the essence to prevent the foreclosure on hypothecated lands. While the current settlement approach may not be the most ideal proposal in terms of ease or cost of administration, it would both reconstitute the trust at the fair market value of the original lands and provide a corpus that could be preserved in virtual perpetuity. The settlement can work only if the courts rule against the environmental intervenors' legal claims. If this occurs, then the current settlement seems viable. If the intervenors prevail, or if the parties determine that the reconstitution process cannot meet the necessary timetable, then the alternative solution based on chapter 210 would be in order, especially given its relative ease of administration. The courts and the parties must not lose sight that only a timely settlement and final adjudication will allow mental health advocates and the state to focus

198. *See supra* text accompanying note 96. The similarity lies in the provision in both Mr. Volland's proposal and in chapter 210 for six percent of the state's unrestricted general fund revenues to be applied annually to mental health programs.

199. *See supra* text accompanying note 96; *see also* Hal Bernton, *Mental-health-trust Plaintiff Backs Alternate Plan*, ANCHORAGE DAILY NEWS, March 20, 1992.

200. Telephone interview with Wendy S. Feuer, Assistant Attorney General, Natural Resources and Environmental Section, Anchorage (Nov. 6, 1992).

201. Interview with David T. Walker, Attorney, Law Office of David T. Walker (Mar. 16, 1992).

more attention on the real underlying goal of the AMHEA: to provide adequate programs for Alaska's mentally ill.

John Stuart Kaplan

Afterword

This section briefly describes the status of the *Weiss* litigation as this issue of the *Alaska Law Review* goes to press. There are currently four main categories of issues which must be resolved before the superior court will submit the settlement agreement to the plaintiff class for approval. The first group of issues are those raised by the environmental intervenors, as detailed in the text of this Note. These issues are currently being briefed, and oral arguments will likely take place in early January, 1993.

A second set of issues are raised by the dissenting plaintiffs' motion in opposition to the proposed settlement. The dissenting plaintiffs allege deficiencies in the proposed settlement agreement and in the manner in which it was negotiated. Evidentiary hearings regarding these claims were held on September 24-25; the hearings did not conclude in the time allocated and have been continued indefinitely. They will likely resume in January when the court hears oral arguments on the environmental issues.

Also, Marathon Oil Company ("Marathon") and Union Oil Company of California ("Unocal") filed a motion to intervene on September 4, 1992. They oppose the provision in the settlement agreement which nominates the state's oil and gas leases in Cook Inlet as substitute lands. As lessees under these leases, Marathon and Unocal are wary of being affected by the transfer of the lessor's interest. Such leases give the lessor various discretionary rights, and the oil companies are worried that the MHTA, as lessor, might attempt to limit production or hold out for higher royalty rates. The court likely will not act on the oil companies' motion until the environmental issues are resolved, since the opposed lease transfers will be blocked if the environmentalists succeed in blocking the entire settlement agreement.

Finally, a separate controversy was raised by the joint motion of the state and the settling plaintiffs to modify the July 1, 1990 preliminary injunction and to cancel lis pendens with respect to certain lands. This motion seeks to let the state issue patents to third parties who have already paid in full under land sale contracts. Because such third party rights are a primary consideration for the state, the settling plaintiffs' willingness to join in this motion is a key to the state's support of the settlement agreement. If the court does not rule on this motion by the end of November, either party can terminate the settlement agreement. The environmental intervenors and the dissenting plaintiffs both oppose this joint motion, claiming that granting the requested relief would only lead to eventual further litigation.

HOUSE RESOURCES COMMITTEE

SUBJECT OF MEETING: Briefing on Mental Health Lands Issues

DATE: 2/3/93

PLACE: Capitol, Room 124

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
1 David Walker	~~Plaintiffs~~ Settling Plaintiffs	417 Harris St / Van Weiss	99801		586-3537	Y	N	
2 Jim Gottstein	AMHA Settling Plaintiffs	406 G St #206, Anchorage	99501		274-7686	Y	N	
5 Tom Waldo	SCLDF Public Interest Intervenors	325 Fourth St. Juneau	99801		586-2751	Y	N	
3 ~~Jeff~~ JESSEE	NON-SETTLING PLAINTIFFS	615 E. 82nd SUITE 101 ANCH. 99518	99518		344-1002	Y	N	
6 Peter Maassen	Wocal P Marathon	810 N St. Anch. Ak ~~99501~~	99501		276-6100	(Y)	N	
4 R. B. Stiles (Bob Stiles)	D&R Ventures	1227 W 9th #201	99501		276-6868	(Y)	N	
Deborah Smith	AMHB	431 N. Franklin	99801		3071	(Y)	N	
Teleconference: see attached						Y	N	
						Y	N	
						Y	N	
						Y	N	

02/03/93 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
08:37:57 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC
TCN 30162 SCHEDULED FOR:02/03/93 08:00 TO 10:00 FOR:ANC
PUBLIC HEARING HOUSE RESOURCES

LOCATION [illegible]

OVERVIEW MENTA		D.S.	GLAVINOVICH	DDC	OBSERVE
OVERVIEW MENTA		BRADLEY	PENN	MARATHON OIL	OBSERVE
OVERVIEW MENTA	6	LUISANN	KEEDER	SUSITNA VALLEY	TESTIFY
OVERVIEW MENTA		STEVE	BORELL	AK MINERS	OBSERVE
OVERVIEW MENTA		CLIFF	EAMES	AK CNTR ENVIRON	OBSERVE
OVERVIEW MENTA		BRIAN	BJORQUIST	ATTY GENERAL	OBSERVE
OVERVIEW MENTA		TIM	BRADNER	LEG DIGEST	OBSERVE
OVERVIEW MENTA		BECKY	GAY	RDC	OBSERVE
OVERVIEW MENTA		BELINDA	CONNOLLY	ADVOCY SVC	OBSERVE
OVERVIEW MENTA	7	JIM	BARNETT	ANCH ASSEMBLY	TESTIFY