SB

67

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M E M O R A N D U M January 28, 1993

SUBJECT: Senate Bill 67, amending provisions of ch. 66, SLA 1991 (relating to the reconstitution of the mental health trust); and providing for an effective date -- sectional analysis (Work Order No. 8-LS0409\A)

TO: Senator Mike Miller, Chair
Senate Resources Committee
ATTN: Teresa Sager-Stanchiff

FROM: Jack Chenoweth
Legislative Counsel

The measure, based on CSSB 469 (Resources) of the last legislature, sets out a series of proposed amendments to ch. 66, SLA 1991, the legislation reconstituting the mental health trust. Necessarily, I will discuss these provisions out of the order in which they appear in the bill.

I

Sec. 54 of existing ch. 66, SLA 1991, reconstitutes the corpus of the mental health trust by identifying specific land held by the state and that is to be conveyed by it in order to reconstitute the trust. Sec. 55, ch. 66, SLA 1991, authorizes substitution of other state land (i.e. "replacement land" as substitution for former mental health lands that now cannot be returned to the trust because it is unavailable to the state) to the reconstituted trust and sets out standards to guide the making of replacement land substitutions. Sec. 56, ch. 66, SLA 1991, is an enforcement mechanism in that it hypothecates or pledges certain state assets to secure the transfer of compensation due the reconstituted trust corpus. These provisions are proposed to be repealed by **bill section 8**.

In their place, **bill section 6** proposes to reconstitute the trust corpus in the permanent law. Some, but not all, of the land identified in sec. 54, ch. 66, SLA 1991, is carried over into this section. Omitted from the list approved in the 1991 Act is land identified in paragraph (5) (Tanana Valley State Forest and Haines State Forest

Resource Management lands), paragraph (6) (other land satisfactory to the plaintiffs drawn from legislatively-designated areas), and paragraph (7) (compensation land identified under former sec. 55). Added, in the enumeration set out in bill section 6, is land subject to "other lease" (proposed AS 38.05.800(2)(A)), land subject to mining claim or sale of materials (proposed AS 38.05.800(2)(D) and (E)), and land exclusive of that necessary to carry out purposes of an interagency land management agreement (proposed AS 38.05.800(3)).

In the 1991 legislation, existing AS 38.05.800 was to have been repealed. Since, in this bill, AS 38.05.800 would be modified and continued, the change set out in **bill section 7** drops that section from the list of sections repealed in the 1991 legislation.

II

This legislation also proposes to revise the mechanism by which to reconstitute an important element of the mental health trust, the mental health trust income account. Under current AS 37.14.036(c), the state obligates itself to pay to the mental health trust income account a declining percentage (six percent at inception declining to one percent in the last years) of unrestricted state revenue, the last payment to be made by June 30, 2003. The change proposed by **bill section 4**, a reenactment of AS 37.14.036(c), directs that a fixed annual payment of six percent of unrestricted state general fund revenue be allocated for an indefinite period "as compensation for land that constituted the [original] trust . . . and that is not reconstituted as part of the mental health trust corpus established under AS 38.05.800 . . . ." The payment, when made by the state and received by the trust, would be added to the balance of the mental health trust income account, the principal source of support for the programs and services to the trust beneficiaries.

However, payment of the allocation requires legislative appropriation. As a guarantee that the allocation will be made, **bill section 5** adds two subsections to AS 37.14.036. Under proposed subsection (d), land that came to the state under the mental health enabling act and that has been since placed in so-called "legislatively-designated" land status--state park, state forest, state game refuge, and the like--would be pledged as security. Under proposed subsection (e), the superior court is given the authority to determine the manner of the trust's foreclosure against those lands in the event the state fails to make the required allocation under subsection (c).

I want to note that it was the decision to convert the six percent payment obligation from one with a set termination date to one of indefinite duration that prompted the addition or revision of permanent law sections and the repeal or deletion of temporary law sections.

III

Two provisions, bill sections 2 and 3, change provisions of ch. 66, SLA 1991, that relate to the management of trust assets.

The language added in **bill section 2** revises the responsibility given the Alaska Mental Health Trust Authority as to management of the land assets of the trust. It would require that the land assets of the trust be managed by the state's Department of Natural Resources under an agreement between the department and the mental health trust authority unless the authority "determines that the best interests of trust beneficiaries would be served by other arrangements." The change would replace the current language providing the mental health trust authority the option to contract with the department for land management services.

Ch. 66, SLA 1991, reestablishes a mental health trust fund. That fund consists of the cash assets constituting part of the trust principal. The amendment made by **bill section 3** would direct that the earnings derived from management of the land that is within the trust corpus--that is, of the land identified in AS 38.05.800, reenacted in bill section 6--are to be constituted part of the trust principal (and not added to or made part of the mental health trust income account).

IV

Finally, the Alaska Court System had asked that several changes be made in the definition of the jurisdiction of a court to hear disputes arising under ch. 66. Accordingly, in **bill section 1**, the superior court is designated the court of original jurisdiction to hear and resolve disputes arising out of AS 37.14.036(c) (the subsection is reenacted in bill section 4) and out of AS 37.14.036(d) and (e) (these subsections would be added by bill section 5). Under **bill section 9**, a dispute to be heard by the superior court may be referred by a judge to a special master appointed for the purpose. Finally, under existing sec. 57, ch. 66, SLA 1991, original jurisdiction to hear disputes is vested in the Supreme Court. (Sec. 57, ch. 66, SLA 1991, is repealed as part of the series of repealers set out in **bill section 8**.) These changes have the effect of making the judicial examination and resolution of disputes involving reconstitution and payment of money due the reconstituted trust similar to the manner of examination and resolution of other disputes to which the state is a party.

*

Senate Bill 67 is given an immediate effective date. Since the effective date of the principal measure, ch. 66, SLA 1991, is dependent on the outcome of judicial proceedings dismissing the litigation in Weiss v. State, the coming into effect of this bill would in effect be delayed as well.

JBC:gc
93-076.glc

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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February 3, 1993

The Honorable Mike Miller, Chairman
Senate Resources Committee
Seventeenth Alaska State Legislature
Room 423
State Capitol
Juneau, Alaska 99801-1182

Re: SB 67 (RES) (mental health lands trust)

Dear Senator Miller:

A bill relating to Weiss v. State, 4FA-82-2208 Civil, the mental health lands trust litigation, has been introduced by your committee. It is SB 67 (RES) (hereafter referred to as "SB 67"). SB 67 is substantially identical to SB 469 which was before this committee last year. Governor Hickel, Natural Resources Commissioner Olds, and I all opposed SB 469 last year and we oppose SB 67 now. This letter gives you our reasons for opposing the bill.

We oppose SB 67 because, notwithstanding what the legislature might want to do with respect to mental health funding on an annual basis, this bill is nothing more than a raid on the state treasury. It also presents several other problems which cast serious doubt on whether it would resolve the litigation.

In Chapter 66, SLA 1991, the bill passed as a framework for settlement of the case, the state gave up a $1.3 billion offset which the Alaska Supreme Court held that the state is entitled to. Chapter 66 also provides a number of other benefits to the plaintiff class which they would not be able to obtain in continued litigation, including (1) a new mental health permanent fund would be established, (2) a new Mental Health Trust Authority to manage the reconstituted trust and oversee the administration of the state's mental health programs would be created, (3) a separate process for appropriating trust revenues would be provided, (4) the state's current mental health program will be significantly amended to make it both more comprehensive and more expensive, and (5) perhaps most significantly, court approval would be required for any change in the future. SB 67, in addition to giving up the offset and all of the other benefits given plaintiffs in Chapter 66, would return much of the original land grant to trust status and commit six percent of the unrestricted general fund and all new

revenues from the returned lands to the trust every year in perpetuity. Because of the restrictions which would be applied to that money, however, the actual amount committed to mental health programs would be substantially greater.

That is much too much to pay to settle the case. Any litigation settlement that I approve must be drafted in light of the state's potential liability. Under the Supreme Court's order, a fair resolution of this case would be to return to trust status the original mental health lands which SB 67 (RES) would return, and consider the $1.3 billion offset as having purchased the balance of the original grant. By reconstituting the equivalent of the full original one million acre mental health trust, Chapter 66 was more than fair. The threatened continued litigation over Chapter 66 by its opponents is not a sufficient reason to return much of the original land grant to trust status, commit six percent of the unrestricted general fund to the trust in perpetuity, and create a possibility that substantially greater expenditure of state general funds will be required for mental health programs.

Some say that passage of this bill would be a panacea and make all the litigation over this issue disappear. That simply is not true. Other claims will be made, at least some of which we have already identified and describe below.

Fundamentally, however, I would recommend a veto of SB 67 if it passes in its current form because it simply is too much to pay for a quick resolution of this case. It would be a breach of my fiduciary duty as Alaska's Attorney General, a duty that I owe to all Alaskans, to do otherwise.

Brief explanations of the problems with SB 67 are set forth below.

I. SB 67 could cost the state far more than six percent of the unrestricted general fund every year.

SB 67 would commit six percent of the unrestricted general fund to the mental health trust every year. Proponents of the bill argue that, because the state currently spends about six percent of the unrestricted general fund on mental health programs, SB 67 would not cost the state any more than it currently is spending. That is not true.

The legislature authorized expenditure of $132,386,900 from the mental health trust for mental health programs in FY 92, while six percent of projected FY 92 unrestricted general fund revenues is almost identical -- $132 million. But the programs for which the more than $132 million in trust spending is authorized are those that the legislature has determined are appropriate for funding from the trust. Not everyone agrees with the legislature's determination in that regard.

Most specifically, the Alaska Mental Health Board (which has current responsibility for making recommendations for funding from the trust, a responsibility that under SB 67 would be assumed by the Alaska Mental Health Trust Authority established under Chapter 66) believes only about half of that amount goes to programs that should be funded by the trust.

Under Chapter 66's stringent restrictions on the legislature's and the governor's ability to deviate from the Trust Authority's recommendations for appropriation of trust funds, more than $60 million in programs currently funded by the trust would have to be funded from general fund revenues over and above the six percent SB 67 would commit to the trust if the Trust Authority were to adopt the current board's narrow approach to programs that qualify for trust funding. SB 67 thus could result in far more than six percent of the unrestricted general fund being committed to mental health programs every year. (We "accepted" the restrictions on appropriations in Chapter 66 because they were coupled with a declining percentage of general fund contributions to the trust. They would have been unacceptable if applied to a fixed percentage in perpetuity, which is what SB 67 would do.)

In other words, the true cost of this bill is far more than six percent of the state's unrestricted general fund, and that does not even count additional monies attributable to development of the lands which would be returned to the trust. SB 67 would simply cost the state too much.

II. SB 67 would violate the Alaska Mental Health Enabling Act.

Section 3 of SB 67 would require that all "proceeds earned" from the reconstituted mental health trust lands -- i.e., both principal from the sale of trust land or extraction of nonrenewable resources and income from leasing the land or the sale of renewable resources -- be deposited in the mental health trust fund, a permanent fund from which only the earnings may be spent. Subsection 202(e) of the Alaska Mental Health Enabling Act (the federal act that created the trust), however, provides in part that "such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska."

We believe we can defend the deposit of principal from the lands in the mental health trust fund under general private trust law principles. But income from trust lands is normally spent for trust purposes, and Congress clearly intended that income from mental health lands be spent first for programs before being used in any other way. Depositing the income directly in the fund, therefore, is prohibited by the federal Enabling Act.

III. SB 67 may create an unconstitutional dedicated fund.

Article IX, section 7 of the Alaska Constitution prohibits the dedication of state revenues to specific purposes "unless required by the federal government for state participation

in federal programs" or if the dedication pre-dated the constitution. As noted in the preceding section, section 3 of SB 67 would dedicate trust land income to the mental health trust fund, and such income could not be spent on mental health programs as Congress required when it created the trust originally.

Because the dedication of income to the permanent mental health trust fund is not required by federal law (and, indeed, is prohibited by the Enabling Act), it may violate article IX, section 7. We are analyzing this issue.

IV. SB 67 may violate the single appropriation bill requirement.

Chapter 66 imposes several restrictions on appropriations of income from the reconstituted mental health land trust, including a requirement that the governor introduce a separate appropriation bill limited to appropriations from the mental health trust income account. SB 67 would apply the separate bill requirement to a percentage of the unrestricted general fund. The Alaska Constitution imposes specific requirements upon the Governor with respect to the preparation and review of the budget and all appropriations and upon the legislature with respect to passage of the budget and all appropriations. The restrictions placed on the budget and appropriation processes in Chapter 66 when applied to a percentage of the unrestricted general fund revenue in perpetuity raise serious questions regarding the permissibility of delegating some of those responsibilities to an agency such as the Trust Authority. We are analyzing these issues.

V. Land management would remain a question under SB 67.

The proponents of SB 67 suggest that, because it would require the Alaska Mental Health Trust Authority to contract with the Department of Natural Resources to manage the land unless the Authority determines that it is in the best interest of the trust to do otherwise, SB 67 allows continuity of management and gives affected industries some comfort with respect to trust ownership of the land.

What they fail to recognize, however, is that the courts will require that trust lands be managed in a fiduciary manner and in the best interest of the trust. Whether DNR or the Trust Authority exercises management duties, therefore, the current state pricing structure and policies for land use could not be applied to trust lands unless they meet fiduciary standards and are in the best interests of the beneficiaries and not just the best interests of the state standard employed by DNR for non-trust lands. The "comfort" to affected industries therefore is illusory.

VI. SB 67 provides no protection to third party interests and would create potential liability for the state.

As under Chapter 66, SB 67 would reconstitute the trust with some "encumbered land" -- i.e., land subject to an oil or gas lease, coal lease, or other lease, timber contract, mining claim, sale of materials, land use permit or right-of-way. Under the Settlement Agreement implementing Chapter 66, the plaintiffs agreed that the trust would be bound by the terms of such encumbrances because the trust will be compensated to the extent those encumbrances reduce the value of the lands returned to the trust.

Nothing in SB 67, however, provides that the trust will be bound by the terms of the encumbrances, nor does it provide compensation for those encumbrances. Instead, the trust would be given an "all or nothing choice" to either accept the encumbrance and receive no compensation in return for the devaluation or contest the validity of the encumbrance and, if successful, receive the parcel with no devaluation. Faced with this choice, the trust would vigorously contest the validity of third party interests.

If the trust were to successfully challenge an encumbrance or some of its terms, an affected third party might then try to hold the state liable for the termination of the encumbrance or an increase in rents or royalties. The state would then have settled the Weiss case only to expose itself to numerous other lawsuits.

VII. SB 67 would preclude development of some land currently available for development.

Section 5 of SB 67 would pledge all original mental health lands in state parks, state forests, state wildlife refuges, etc., as security for the state's performance under the bill. Under the Settlement Agreement implementing Chapter 66, and to the extent permitted by the statutes governing the areas, those lands will be available for development prior to court approval if plaintiffs agree and after court approval whether plaintiffs agree or not. If they become security for the state's performance as SB 67 would provide, however, the state would be obligated not to diminish their value. In other words, even if otherwise allowed by law, development would be prohibited.

VIII. SB 67 does not protect Native allotments.

Under Chapter 66 and the Settlement Agreement, original trust land encumbered by valid Native allotment claims will not be returned to the trust; instead, the trust will receive other state land to compensate for any value lost to the trust as a result of those claims. As a result, the state will decide whether to challenge the validity of Native allotment claims and will review Native allotments on original trust land under the same standards applied to general state land instead of under a higher trust standard of review which would result in more challenges. Under SB

67, land with allotment claims would go back to the trust, and the trust would be almost compelled to challenge each claim because, if the claim were found valid, the trust would receive less valuable over-selection land.

IX. **The provisions of the April 6, 1992 Settlement Agreement cannot be simply cut and pasted into a new agreement.**

Supporters of SB 67 have argued that, as a time saving measure, all that will be necessary for a new Settlement Agreement is to cut and paste pertinent parts of the Chapter 66 Settlement Agreement. This will not be possible because each provision of the April 6 Settlement Agreement was negotiated in the context of Chapter 66.

For example, the Settlement Agreement defines an encumbrance to mean every kind of lease, permit, contract, right-of-way, interagency land management agreement, etc. If that very expansive definition is used in a new settlement agreement, very little original trust land would be returned to the trust because SB 67 provides that only certain encumbered land is returned to the trust. As another example, Chapter 66 provides for conveyance of the reconstituted trust lands to the Trust Authority, and the Settlement Agreement includes detailed provisions for such conveyances and for proper accounting following such conveyance. Under SB 67, trust lands will not be conveyed. Instead, they will simply be redesignated, and an entirely different approach would have to be taken in any implementing settlement agreement.

X. **Certain pending challenges to Chapter 66 raised by intervenors would be equally applicable as to SB 67.**

Certain issues raised by both the environmental and oil company intervenors to challenge Chapter 66 are equally applicable as to SB 67. The issues raised by the environmental intervenors have been fully briefed and the matter is pending for decision before the trial court. The issues raised by the oil company intervenors will be briefed on an expedited schedule dictated by the trial court, with dispositive motions due on or before March 22, 1993. While we believe these challenges have little or no merit, the interventions have raised the following issues:

1. **A settlement that provides too much compensation may not be approved because it is contrary to the public interest.**

The environmental intervenors argued in opposing preliminary approval of the proposed Chapter 66 settlement that the broad public interest must be considered, and any settlement that provides too much compensation is contrary to the public interest and must be rejected by the court. Their specific claim is that because the state waived the "offset" and agreed to reconstitute a land trust comparable in value to the original one million acre grant, the trust receives too much, the settlement is therefore

contrary to the public interest, and the court may not approve it. As is set forth above, an even better claim may be made that SB 67 would "overcompensate" the mental health trust at the expense of other public needs, such as education, public safety, transportation, etc.

2. **A bill that includes provisions that affect both the status of public lands and other substantive provisions violates the constitutional requirement that bills for appropriation shall be confined to appropriations [Art. II, Sec. 13, Alaska Constitution].**

The environmental intervenors challenged Chapter 66 arguing that constitutional provisions related to appropriation bills apply to bills that affect the status of public lands. The State argued that this constitutional provision applies only to appropriations of state revenues. If the environmental intervenors argument is correct, then SB 67 is unconstitutional because it includes both an "appropriation" of land [see Sec. 6, SB 67] with other substantive provisions. Further, if the environmental intervenors argument is correct, whether any public lands are now validly within legislative designated areas is subject to challenge because legislation that created those designated areas included both "appropriations" of land and other substantive provisions.

3. **SB 67 provides no "other safeguards of the public interest" in terms of management of lands by the Trust Authority or conveyance of lands to the Trust Authority.**

The environmental intervenors argue that Chapter 66 violates Article VIII, Section 10 of the Alaska Constitution because it fails to provide "other safeguards of the public interest" both as to the management of lands by the Trust Authority and as to the conveyance of lands to the Trust Authority. SB 67 does not address either of those arguments, but instead leaves trust land managment and conveyance of land to the Trust Authority as they appear in Chapter 66.

4. **Whether state leases may be assigned to the Trust Authority.**

The oil company intervenors challenge whether the state may assign its lessor's interest in state oil and gas leases to the Trust Authority. The court permitted the intervention, in part, because "[i]f the [oil company] intervenors are correct and the reason [they are correct] is broadly applicable to state leases, it will be impossible to reconstitute the trust under the Chapter 66 procedures." The assignability of all state leases -- and more broadly land contracts -- is therefore at issue. Whether the state may assign its interest in oil or gas leases, coal leases, or other leases, timber contracts, mining claims, material sales, land use permits or rights-of-way under Sec. 6 of SB 67 could also be challenged.

For all of the foregoing reasons, I would recommend that Governor Hickel veto SB 67 should it pass the legislature. It certainly is not appropriate to pass such legislation as a settlement of the Weiss litigation, especially since Chapter 66 will resolve the litigation on terms which are fair to both the trust and the state.

If I or my staff can answer any questions, please contact us at your convenience.

Very truly yours,

Charles E. Cole
Attorney General

cc: Glenn Olds, Commissioner of Natural Resources
Kris Lethin, Senior Legislative Liaison

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:

Alaska Center for the Environment
Alaska Sportfishing Association
Lynn Canal Conservation
Northern Alaska Environmental Center
Susitna Valley Association
Sierra Club
Southeast Alaska Conservation Council
Trout Unlimited

WEISS v. STATE: AN OVERVIEW

January 27, 1993

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

The federal law

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

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

Since the territory had no taxing power, the Act included two forms of grants-in-aid. The first was a temporary transitional grant of decreasing amounts of money, and required that the territory meet certain program minimums. The second was a one million acre land grant and requiring that "[a]ll lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." The land grant to the territory was confirmed to the state in sec. 6(k) of the Alaska Statehood Act.

State administration of the land grant

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

Municipal and private parties' demands for land in the late 1970s resulted in passage of chapters 181 and 182, SLA 1978, both of which redesignated all mental health lands as general grant lands. Both acts provided for the trust to be compensated by payment of one and one-half percent of all state land revenues to a permanent trust fund, but chapter 182 made it subject to legislative appropriation of sufficient funds and the legislature never appropriated any money.

Many transactions have occurred with respect to the original one million mental health land grant. The following table sets out the current status of the original mental health trust land grant:[1]

Conveyed to third parties (3,162 parcels)	46,000 acres
Conveyed to municipalities (888 parcels)	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	997,600 acres

The litigation

On November 26, 1982, a class of plaintiffs needing mental health services sued the state alleging that the 1978 redesignation legislation was invalid and that the state should be required to administer as a trust as provided in the Enabling Act. The state opposed on the ground that the 1978 legislation was consistent with the purpose of the Enabling Act, maintenance by the state of a mental health program. On June 15, 1983, Superior Court Judge Warren Taylor held (1) that the 1978 legislation was a breach of the trust, but (2) that the remedy was not to invalidate the 1978 law but instead to order the state to compensate the trust for

[1] Many of the acreage figures are approximations. As a result, the total shown is 997,000 acres and not one million. Precise acreage figures will have to await completion of detailed title work.

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

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

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

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

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

ownership. For "former mental health lands" which the state had "sold," the Court instructed that the trust was to receive the fair market value of the lands at the time of sale, subject to a set-off for state mental health expenditures (approximately $1.3 billion since 1978). The Court did not otherwise address the title of third parties to whom the state had conveyed mental health lands.

On January 24, 1986, the Supreme Court directed that the Association be permitted to intervene. Judge Mary E. Greene (to whom the case was assigned following Judge Taylor's retirement) granted the motion. In the order allowing intervention, she authorized the Association to file an amended complaint "only insofar as the Additional Claims relate directly to the reconstitution of the trust ordered by the Alaska Supreme Court in State v. Weiss."

In chapter 132, SLA 1986, the state created the interim mental health trust commission. Its primary duties were (1) to oversee the state's administration of mental health lands by requiring commission approval for all sales, leases, or exchanges of original mental health lands, (2) to determine state mental health program expenditures since 1978, and (3) to make recommendations to the legislature on how to fix the problem.[4]

At almost the same time, two additional groups moved to intervene: Mentally defective and retarded persons represented by Advocacy Services of Alaska ("Advocacy Services") and Alaska Addiction Rehabilitation Services and chronic alcoholics with psychosis ("Nugen's Ranch"). They argued that they were beneficiaries of the trust on the ground that Congress intended the beneficiaries of the trust to include all those who were at risk of being institutionalized at Morningside Hospital, a group that included the mentally defective and retarded and chronic alcoholics with psychosis. The state opposed the motions on the ground that construing the Act as including those groups would be contrary to the basic purpose of the Act, which was to give the territory and now the state plenary authority to determine who its mental health program was serve and that the state's program covered only those considered mentally ill in the traditional sense. The original plaintiffs also opposed the motions and agreed with the state. The Association said Congress only intended those traditionally considered mentally ill to be covered by the program, but even if it intended others it did not intend that the territory and now the state could pick and choose.

Judge Greene agreed with Advocacy Services and Nugen's Ranch, and held that the beneficiaries of the trust at minimum

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[4] The commission included five members: the commissioners of health and social services and natural resources, and three representatives of the plaintiffs.

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

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

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

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

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

forthcoming, but the plaintiffs did not file any title challenges.

The 1990 legislature sought to resolve the valuation impasse by enacting an alternative resolution mechanism which is not predicated on the value of the lands. Chapter 210, SLA 1990, provides that all lands that were in legislatively designated areas on September 7, 1987, are exchanged for the original mental health lands not in such areas, and that the state will rent those lands from the trust for six percent of unrestricted general fund revenues plus all incidental revenues from those lands (camping fees, etc.).

After the bill which became chapter 210 passed the legislature, but before it was signed by the governor, the plaintiffs moved for a preliminary injunction to enjoin the state from issuing any patents, leases, rights-of-way, permits, or other authorizations for activities on the original mental health lands on the ground that doing so might diminish the trust. The state opposed on basically the same grounds on which the state's preliminary injunction motion was based (adequacy of monetary compensation, etc.).

On July 9, 1990, Judge Greene denied the state's motion and granted the plaintiffs' motion. She concluded that it was not clear that the plaintiffs could be adequately compensated in money despite the fact that the purpose of the grant was to generate funds, that the Alaska Supreme Court had directed the superior court to reconstitute the trust as it existed just prior to the 1978 legislation (to the extent that was possible), and that she had no authority to deviate from the Supreme Court's mandate. She urged the parties "to move expeditiously" to resolve the legal issues relating to third parties' title to mental health lands the state had conveyed to them. The state petitioned the Alaska Supreme Court to review the decision, but the Court declined.[6]

The state moved in superior court for clarification of the July 9, 1990 injunction. Chapter 210 became effective on July 10, 1990, and there was confusion whether the injunction covers only the original mental health lands, the reconstituted ("new") trust lands in legislatively designated areas, or both. Judge Greene clarified that the injunction covers only the original mental health lands and not the lands in legislatively designated areas placed in trust status under chapter 210. She also ruled that the state could continue issuing camping permits for original mental health lands in state parks as long as the fee charged was comparable to that charged for similar private camping privileges and the fees generated were deposited in a mental health trust account.

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[6] Unlike an appeal of right, the granting of a petition for review is discretionary with the Court.

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

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

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

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

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

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

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

original mental health lands to trust status, (2) purchased those original mental health lands not appropriate for return to trust status (e.g., those included in legislatively designated areas, conveyed to third parties and municipalities, etc.) at values determined under the procedures approved by the interim mental health commission (approximately $2 billion total) with no set-off for mental health expenditures by the state as authorized by the Alaska Supreme Court in the Weiss decision, (3) established a Mental Health Trust Authority to administer trust assets (both land and money) and make all decisions regarding expenditure of trust revenues and program funding, and (4) made the program more comprehensive and consistent with current thinking. Because the cost of purchasing the lands not returned to trust status at the values determined under the procedures approved by the interim mental health trust commission would have been so great, and because both the legislature and the governor would have been cut out of their constitutional roles in the budgetary and appropriation process with respect to mental health funding and expenditures, the administration opposed the bills.

Near the end of the 1991 session, the administration and three of the four plaintiff groups reached conceptual agreement on a proposed settlement that, instead of requiring the state to purchase the original mental health lands not returned to trust status, required the state to reconstitute a mental health land trust by exchanging other state lands of equal fair market value and comparable character to the original mental health lands not returned, including those in legislatively designated areas (except that those in the Haines State Forest and the Tanana Valley State Forest), those conveyed to third parties and municipalities, and those subject to certain other encumbrances. The exchange process would require a balancing of the public interest in retaining lands proposed for exchange and the trust's interest in having the lands conveyed, with any irreconcilable disputes resolved by the court. It also provided for creation of a Trust Authority to manage the trust's assets and make recommendations to the governor and the legislature regarding the state's mental health program and appropriate funding for it. It provided for a separate appropriation process for mental health spending under which the governor and the legislature retained their constitutional authority over the process but, if the final decisions differed from the Trust Authority's recommendations, required written findings supporting the determinations that the different funding levels meet the projected needs of the beneficiaries of the mental health trust. Certain state lands agreed to by the administration and the settling plaintiffs would be pledged as security for the state's performance of its duties under the proposed settlement (the hypothecated lands), and the agreement would take effect upon dismissal of the case. The conceptual agreement was passed by the legislature as chapter 66, SLA 1991, and the state and settling plaintiffs agreed on the lands to be hypothecated (including Cook Inlet oil and gas leases as the "collateral of last resort) shortly

thereafter.

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

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

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

settlement on June 29, 1992. Nugen's Ranch and the environmental intervenors opposed the state's and settling plaintiffs' motions. The state moved for summary judgment on the environmental intervenors' challenges on August 28, 1992. On September 4, 1992, Union Oil Company and Marathon Oil Company moved to intervene to challenge the information sharing provision of the settlement agreement and the inclusion of the state's interest in Cook Inlet oil and gas leases in the lands hypothecated as security for the state's performance. The settling plaintiffs moved to dismiss the environmental intervenors' challenges or, in the alternative, for summary judgment on October 14, 1992. The environmental intervenors cross-moved for summary judgment on November 5, 1992. Advocacy Services withdrew its support for the proposed settlement on December 12, 1992. On January 14, 1993, Judge Greene denied the state's and settling plaintiffs' motion to modify the July 9, 1990 preliminary injunction and lift the lis pendens with respect to lands conveyed to private third parties, but without prejudice to refiling it once she has ruled on the motions for preliminary approval and the cross-motions with respect to the environmental intervenors' challenges. On January 22, 1993, oral argument was held on the oil companies' motion to intervene, the state's and settling plaintiffs' motions for preliminary approval, and the cross-motions with respect to the environmental intervenors' challenges. At the conclusion of the argument, Judge Greene took all of the motions under advisement. She granted the oil companies' motion to intervene later in the day on January 22, 1993; the other motions remain under advisement.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

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

Plaintiffs,

and

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

Intervenor-Plaintiffs,

vs.

STATE OF ALASKA,

Case No. 4FA-82-2208 Civil

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

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

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

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

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

The State and settling plaintiffs argue that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

what it would take to litigate this case.

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

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

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

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

The State and the settling plaintiffs disagree regarding whether it is possible to create bona fide purchasers in this situation. If the settling plaintiffs are correct and no bona fide purchasers can be created, the "relief" in this motion becomes nothing more than a cruel hoax visited on the third parties. They get no relief; they would receive a worthless piece of paper and unmarketable title. They would not get any better title than they have now. If they transferred their interest in the land, they would be selling a lawsuit and both they and the purchasers would ultimately have to litigate. This would only further complicate this litigation by adding yet another layer of subsequent title holder whose rights would have to be adjudicated.

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

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

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

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

that time be granted.

IT IS SO ORDERED.

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

MARY E. GREENE
Superior Court Judge

I certify that on 1-14-93 copies of this form were sent to:
CLERK:
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Norford
Rublum
Kauffman
Mackenzie
Jorgensen
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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 67

Revision Date: February 2, 1993
Title: "...amending...Ch. 66, SLA 1991, that relate to the mental health trust..."
Sponsor: Senate Resources Committee
Requestor: Senate Resources Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Mental Health Lands
COMPONENT SERIAL NO. 1421

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA	-0-	-0-	-0-	-0-	-0-	-0-
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact:

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: February 2, 1993

Richard L. Pegues /for/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 2, 1993

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
Fo[redacted]ce

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 67

Revision Date:

Department Affected: Natural Resources

Title: Mental Health Trust: Alternative Settlement Proposal

BRU: Resource Management

Components: Land Management

Sponsor: Senate Resources Committee

Requestor:

Component Serial No. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	1,022.2	817.2	186.1	197.3	209.2	221.8
TRAVEL	7.5	6.0				
CONTRACTUAL	890.0	1,625.0	2,000.0	2,000.0	2,000.0	2,000.0
SUPPLIES	22.0	14.5				
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1,941.7	2,462.7	2,186.1	2,197.3	2,209.2	2,221.8
CAPITAL						
REVENUE fund source:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA	1,941.7	2,462.7	2,186.1	2,197.3	2,209.2	2,221.8
Other						
TOTAL	1,941.7	2,462.7	2,186.1	2,197.3	2,209.2	2,221.8

POSITIONS:

FULL-TIME	16	11	2	2	2	2
PART-TIME	1	3				
TEMPORARY	2	2				

Estimate of current year (FY93) Impact: $ 1941.7

ANALYSIS:
The program impacts of this legislation are somewhat difficult to determine because of ambiguity in the wording of the legislation. It is unclear if the legislation contemplates the conveyance of unencumbered Original Trust Land to the Trust Authority or its "redesignation" as Original Trust Land on DNR status plats. We have based our analysis on the premise that the aforementioned land is to be conveyed to the Trust Authority. This interpretation seems appropriate since Sec. 2 AS 37.14.009(a)(2) allows the Trust Authority to sell, lease, exchange, or otherwise dispose of land in the trust.

Prepared by: Ron Swanson Phone : 762-2692

Division: Land Date : 29-Jan-93

Approved by Commissioner: Glenn A. Olds Date: 2/2/93

Agency: Department of Natural Resources

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SB.67[1]

DIVISION OF LAND

7100 Personnel Services	FY 94	FY 95
Mental Health Project Team		
(1) Project Manager	80.7	85.5
(1) Lands Manager	55.5	58.8
(2) NRO II	122.6	129.9
(2) NRO I	103.2	130.4
(1) CT III	37.3	39.5
(1) DPC II	39.2	41.3
(2) College Interns	27.5	29.1
	466.0	514.5
Land & Resource Management		
(1) Cadastral Surveyor III	110.2	116.8
Regional Offices		
Northern Regional Office		
(1) NRO II	60.4	32.0
Southcentral Regional Office		
(1) NRO II	60.4	32.0
Southeast Regional Office		
(1) NRO II (6 mo.)	30.2	32.0
Subtotal	727.2	727.3
7200 Travel		
Mental Health Project Team	3.0	3.0
Land & Resources	—	—
Regional Offices		
NRO	1.5	1.0
SCRO	1.5	1.0
SERO	1.5	1.0
Subtotal	7.5	6.0
7300 Contractual Services		
Mental Health Project Team		
Hazardous Substance Inventory	125.0	125.0
Land & Resources		
Cadastral Survey	750.0	1,500.0
Subtotal	875.0	1,625.0

[1] Assumes conveyance of unencumbered OTL to MHTA.

7400 Supplies

Mental Health Project Team		6.0	6.0
Land & Resouces		1.5	1.5
Regional Offices			
NRO		1.5	1.0
SCRO		1.5	1.0
SERO		1.5	1.0
	Subtotal	12.0	10.5
	TOTAL	1,621.7	2,368.8

	94	95
Personnel-Full time	11	9
Part time	1	3
Temporary	2	2

SB 67

LAND RECORD INFORMATION SECTION

Personnel Services	FY 94	FY 95
(1) Analyst/Programmer IV	77.0	0
(1) Analyst Programmer III	68.0	0
(1) Natural Resource Officer II	65.0	0
(1) Natural Resource Officer I	50.0	53.0
(1)(Data Processing Clerk I	35.0	37.0
Subtotal	295.0	90.0
Contractural Services		
DOA Data Processing Chargeback	15.0	0
Subtotal	15.0	0
Supplies		
Plotter, Micrographic & Office Supplies	10.0	4.0
Subtotal	10.0	4.0
TOTAL	320.0	94.0

TOTAL PROJECT COST

		FY 94	FY 95
Personnel Services			
Division of Land		727.2	727.3
LRIS		295.0	90.0
	Subtotal	1,022.2	817.3
Travel			
Division of Land		7.5	6.0
LRIS		0	0
	Subtotal	7.5	6.0
Contractural Services			
Division of Land		875.0	1,625.0
LRIS		10.0	0
	Subtotal	890.0	1,625.0
Supplies			
Division of Land		12.0	10.5
LRIS		10.0	4.0
	Subtotal	22.0	14.5
	TOTAL	1,941.7	2,462.8

	FY 94			FY 95		
	Land	LRIS	Total	Land	LRIS	Total
Positions						
Full time	11	5	16	9	2	11
Part time	1		1	3		3
Temp.	2		2	2		2

OUT-YEAR COSTS

Personnel Services	FY 96	FY 97	FY 98	FY 99
Land Manager	62.3	66.1	70.1	74.3
Cadastral Survey	123.8	131.2	139.1	147.5
Subtotal	186.1	197.3	209.2	221.8
Contractural Survey	2,000.0	2,000.0	2,000.0	2,000.0
TOTAL	2,186.1	2,197.3	2,209.2	2,221.8

ANALYSIS CONTINUATION:

Enacting SB 67 as a proposed settlement of the mental health trust lands litigation will require the Department of Law to undertake some substantial effort, including:

1. Efforts to obtain court approval of the settlement. The mental health trust lands litigation is a class action lawsuit. Settlement of that lawsuit must comply with Rule 23 of the Alaska Rules of Civil Procedure. The parties may first need to draft a settlement agreement to present to the court (a settlement agreement may address terms not specifically provided for in the bill). The settlement agreement must then be presented to the court for preliminary approval--the court must determine that the settlement is fair, reasonable, and adequate. Following preliminary approval, notice of the settlement must be given to the class (in general, beneficiaries of the mental health land trust) so that they may comment to the court about the settlement. Only after notice may the court approve the settlement and dismiss the litigation.

The time and effort necessary to obtain final approval of a settlement arising from SB 67 is uncertain because it is not possible to predict what challenges may come. However, possible challenges include:

(a) that the constitutional prohibition against dedicated funds [Article IX, Sec. 7, Alaska Constitution] is violated by the provision in Sec. 4 of SB 67 [to be codified as AS 37.14.036(c)] that allocates 6% of the unrestricted general fund revenue during each fiscal year to the mental health income account, coupled with the restriction that future legislatures and governors may appropriate these amounts for other high priority public needs only if the funds are not "reasonably necessary to meet the projected operating and capital expenses of the integrated comprehensive mental health program" [Sec. 10, Ch. 66, SLA 1991, to be codified in AS 37.14].

(b) that the dedication of 6% of the unrestricted general fund revenue to the mental health income account [Sec. 4, SB 67], coupled with the reconstitution of almost one-half of the original one million acre land grant [Sec. 6, SB 67], coupled with the restrictions on appropriating amounts from that account under Sec. 10, Ch. 66, SLA 1991 [see Paragraph (a) above] may be challenged as being contrary to the public interest by persons who believe that the legislature and governor should not be restricted from appropriating public funds for other public needs if those needs are of higher priority (e.g. education, public safety, etc.). Different public interest groups will attach different priorities to the public need for different programs.

(c) that the allocation of 6% of the of the state's unrestricted general fund revenue to the mental health income account in perpetuity [Sec. 4, SB 67], coupled with the reconstitution of almost one-half of the original one million acre land grant [Sec. 6, SB 67], coupled with restrictions on appropriating "trust funds" [Sec. 10, Ch. 66, SLA 1991] is contrary to the public interest because it provides too much compensation to resolve this litigation. This claim was raised by intervenors Alaska Center for the Environment, et al. with respect to allegations that the state will overcompensate the mental health trust by reconstituting too much land under Ch.

ANALYSIS CONTINUATION:

66. This "public interest" challenge could more easily be made as to the state overcompensating the mental health trust with funds under SB 67.

(d) that the transfer of any existing leases to the mental health trust [Sec. 6, SB 67, to be codified as AS 38.05.800(2)] could be challenged by the lessees. Marathon Oil Company and Union Oil Company of California have been permitted to intervene in the mental health trust land litigation to challenge the assignability of state oil and gas leases on state general grant land to the trust authority.

(e) that the combination in one bill of the reconstitution of mental health trust lands [Sec. 6, SB 67] with other substantive provisions [the remainder of SB 67] violates the constitutional provision that bills for appropriation shall be confined to appropriations [Article II, Sec. 13, Alaska Constitution]. The Alaska Center for the Environment, et al. have challenged the constitutionality of Ch. 66 on the grounds that this constitutional provision extends to bills that affect the status of public lands--such as reconstitution of land into the mental health trust.

(f) other challenges may be made by parties opposed to SB 67 as a resolution of the mental health trust lands litigation.

2. Enactment of SB 67 may result in litigation with the mental health trust plaintiffs and third-parties who hold interests in former trust lands over whether particular parcels are suitable for being reconstituted into the trust. The provisions in Sec. 6, SB 67 are ambiguous because the bill does not explicitly validate existing interests in former trust lands nor does it identify the specific parcels that will be reconstituted--e.g. trust land that "has not been conveyed or encumbered by the state" is subject to conflicting interpretations.

The settlement agreement negotiated under Ch. 66, SLA 1991 that provides specifically as to parcels which will be reconstituted will not serve SB 67. Under Ch. 66, SLA 1991 the parties negotiated parcels to be reconstituted with the understanding that for any former trust parcel not reconstituted, the state would provide substitute land of comparable character and equal fair market value--the value obtained by the trust was the same regardless of whether the former trust parcel was reconstituted. Under SB 67, the trust is given an all or nothing choice--reconstitute the former trust parcel or receive nothing. Plaintiffs are likely to claim that any parcel arguably described in Sec. 6, SB 67 for reconstituting must be reconstituted regardless of the impact on the state or third-party interests.

The Department of Law currently receives $589,500 in general funds, and $1,000,000 in mental health trust funds to implement the Ch. 66, SLA 1991 settlement, including reconstituting the mental health lands trust within the terms of the settlement. The general funds are used to pay for two attorneys, one paraprofessional, and one clerical employee, who carry-out the state's responsibilities under Ch. 66. The mental health trust funds are provided to the plaintiffs who have accepted the settlement so that they can carry-out their responsibilities under Ch. 66.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 67

ANALYSIS CONTINUATION:

Because of the uncertainties described above, and because of the potential for continued legal challenges, we do not believe that the current efforts of either the state or the plaintiffs, will be reduced if SB 67 is adopted. This would cause existing resources to be redirected to implement and defend the new law. We cannot say if the bill would cause additional costs due to the uncertainty of potential litigation.