

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8010

HOUSE RESOURCES

275

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 Under Senate Bill 493, the legislature has repealed the provisions which created and empowered the Interim Mental Health Trust Commission.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.

²The 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

³The 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.

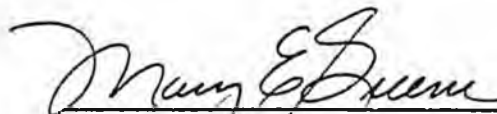
Plaintiffs have argued, and the state does not oppose, that the court should issue the preliminary injunction without bond. It is clear here that the plaintiffs themselves are financially unable to post a bond. It is also true that this is

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: Walker
CLERK: LCH Gottstein
Jesse
AGO-Juneau Koe
Volland
Scholle AMH
O+J

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

Law offices of
JAMES B. GOTTSTEIN

406 G STREET SUITE 206
ANCHORAGE, ALASKA 99501
907/274-7686
FACSIMILE 907/274-7644

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
<u>280,000</u>	acres in less than total conveyances.
778,000	

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 1978³ 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 Cowper⁵, 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

2.This was the period of the "Beirne Initiative" where residents were to be allowed to stake "undesigned" 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 follows⁶:

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

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 state⁷ in the administration of the trust⁸ makes a mockery of the just enunciated standards of conduct. The following is a description of the remedies appro

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 situations 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).

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 purchase¹¹:

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

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 Enjoined¹² 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.

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 own.

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 lawsuit¹⁶ 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) case¹⁷ and no rents or royalties were ever paid these

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.

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 Constitution, the "find-make" distinction has been discredited. Indeed, the United States Supreme 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.

Copyright © 1992 by Alaska Law Review

* The author sincerely wishes to thank the following attorneys for providing essential information and helpful comments: Brian D. Bjorkquist and Wendy S. Fouer, Assistant Attorneys General, Natural Resources & Environmental Section, Anchorage; James B. Gottstein, Law Office of James B. Gottstein, Anchorage; Thomas Koester, Special Assistant Attorney General, Law Office of G. Tho Koester, Juneau; Phillip R. Volland, Rice, Volland and Gleason, P.C., Anchorage; Thomas S. Waldo, Sierra Club Legal Defense Fund, Juneau; and David T. Walker, Law Office of David T. Walker, Juneau.

1. Pub. L. No. 84-830, 70 Stat. 709 (1956).
2. 1978 Alaska Stats. 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(e) 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(e).

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 statute⁷ 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.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 Alaska*, 624 P.2d at 807.

47. *Id.* at 813 n.6 (citing *Mississippi v. United States*, 357 U.S. 206, 210 (1958); *State v. Rosenberg*, 193 Miss. 101, 102 (1951); *State v. University of Alaska*, 624 P.2d at 807 n.3 (1981)). For further discussion of *University of Alaska*, see *in* accompanying text. See also *Weissell v. State Dep't of Highway*, 2 Alaska 1051 n.34 (Alaska 1977) (stating that the grant by Congress under 48 U.S.C. § 553, 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 managed, 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 *Southeast 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 124-123 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 to 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
Missing claims	60,000
Legislatively designated areas	
State forests	113,289
Parks, wildlife refuges, etc.	243,600
Inter-agency land management agreements	4,500
Unencumbered	<u>352,386</u>
TOTAL	997,900 acres

State's Memorandum in Support of Motion for Summary Judgment with respect to Issues Raised in Environmental Intervenor's 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 designees 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 Act⁹⁷ 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 Act¹⁰² 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 Gornuch, 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 decision¹¹⁶ 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

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)).

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

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 Act¹²⁶ 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 *Becky 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 cast 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

135. The DNR's position, as evidenced by the Minority Recommendations of the Interior 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

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

applied.

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.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 "it is also possible, however, that the land grant may be insufficient to sustain the Territory's financial responsibility under the program, and if that is so, the Territory should not be deterred from using funds from other sources to sustain it." *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. Goitstein, Attorney, Law Office of James B. Goitstein, 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 injunction¹⁵¹ 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 patents¹⁵² 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

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 Statute, 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. 4PA-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.

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 Constitution¹⁶⁵ and Alaska Statutes section 37.13.010¹⁶⁶

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(h), (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 appraisal 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 2¹⁶⁸ and the "common use" clause in article VIII, section 3 of the Alaska Constitution.¹⁶⁹ Alaska case law has clarified these constitutional provisions.

In *Kerscher 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 cites¹⁷⁵ 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 "[i]n the *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 Act¹⁸¹ 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. 81-830, § 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); *Boucher 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. Soblo 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

DATE: 2/3/93

PLACE: Capitol, Room 124

SUBJECT OF MEETING:
Briefing on Mental Health
Lands Issues

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 Hiram St Van Wees	99501		584-3537	Y N	
② Jim Gottstein	ATLTA Settling Plaintiffs	406 G St #206, Anchorage	99501		274-7686	Y N	
⑤ Tom Waldo	SCLDF Public Interest Interveners	325 Fourth St. Juneau	99801		586-2751	Y N	
③ JEFF JESSEE	NON-SETTLING PLAINTIFFS	615 F. St. SITE 101 ANCH. 99518	99518		344-1002	Y N	
⑥ Peter Maassen	Local P Manathan	810 N St. Anch. AK 99501	99501		276-6102	(Y) N	
④ B. STILLOS Bob Stilos	DEF VENTURES	1227 W 9th #201	99501		276-6868	(Y) N	
Deborah Smith	AMTPB	431 N. Franklin	99801		3071	(Y) N	
Teleconference - see attached						Y	N
						Y	N
						Y	N
						Y	N

02/03/93
08:37:57

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
SCHEDULED FOR: 02/03/93 08:00 TO 10:00
PUBLIC HEARING HOUSE RESOURCES

TCN 30162

LTN1150
BY:ANC
FOR:ANC

LOCATION

OVERVIEW MENTA	D.S.	GLAVINOVICH	DDC	OBSERVE
OVERVIEW MENTA	BRADLEY	PENN	MARATHON OIL	OBSERVE
OVERVIEW MENTA	LEISANN	NEEDS	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	JIM	BARNETT	ANCH ASSEMBLY	TESTIFY

7

Overview

Men. Health

Lands Trust

Settlement

1-27-93

STATE of Alaska,
Appellant/Cross-Appellee,

v.

Vern T. WEISS, et al.,
Appellee/Cross-Appellant.

Nos. S-653, S-678.

Supreme Court of Alaska.

Oct. 4, 1985.

Class action was brought against State for breach of public trust in enacting legislation redesignating federal mental health grant lands as general grant lands. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., ruled the legislation could not be invalidated, but that the State breached its duties as trustee by removing federal grant lands from the trust. The state appealed, and plaintiffs cross-appealed. The Supreme Court, Compton, J., held that: (1) the State breached its duties as trustee in redesignating the land, and (2) the redesignation legislation was invalid.

Affirmed in part, reversed in part and remanded.

1. Public Lands ¶62

In passing the Alaska Mental Health Enabling Act, the United States Congress intended to create a trust, to be based on a corpus of one million acres of federal land, to help effectuate the creation and operation of mental health care facilities in the state, and the state, as trustee, had no power to alter the status of the property grant, thereby effectively terminating the trust. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709; Laws 1978, c. 181, § 3(a).

2. Public Lands ¶62

In passing act [Laws 1978, c. 181, § 3(a)] redesignating trust lands given state by United States Congress under Alaska Mental Health Enabling Act as general grant land, the State went beyond the power which had been granted it with re-

spect to the land by Congress and the redesignation act was therefore invalid. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709.

G. Thomas Koester, Asst. Atty. Gen., Norman C. Gorsuch, Atty. Gen., Juneau, for appellant/cross-appellee.

Stephen C. Cowper, Fairbanks, for appellee/cross-appellant.

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

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

COMPTON, Justice.

The State of Alaska ("state") appeals from a judgment of the superior court holding that the state breached its duty as trustee of federal mental health grant lands when the legislature redesignated the property as "general grant land." For the reasons set forth below, we affirm the holding to this extent, but reverse the superior court's conclusion that the redesignation legislation was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub.L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:

All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds

and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND

(a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. The record indicates that between 1959 and 1982 the state spent over \$222,000,000 on mental health care. Generally speaking, there has been a constant increase from 1959 to the present in mental health expenditures: slightly less than \$1,200,000 was expended in 1959, and slightly more than \$29,000,000 was expended in 1982. The record does not

indicate how much of the trust land at issue has been disposed of, nor the total value of such disposed land. In the state's answer to the complaint, it alleges that "state expenditures for mental health purposes exceeded revenues from mental health grant lands in all years for which revenues from those lands were tabulated separately." The record does indicate that as of 1973, total revenues from these mental health trust lands amounted to \$19,555,582. The state's total expenditures to that point amounted to \$66,726,176.

Weiss *et al.* filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant...."

The superior court ruled that invalidation of the redesignation legislation was not an available remedy, based on *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). However, the court did hold that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that [t]he public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date....

The court also ordered a set-off for all monies spent by the state on mental health care.

The state appeals from the judgment, except the holding that the redesignation legislation was valid. Weiss *et al.* cross-appealed the trial court's failure to rule the legislation invalid.

II. DID THE STATE BREACH THE PUBLIC TRUST CREATED BY CONGRESS WHEN IT REDESIGNATED PROPERTY IN THE TRUST AS "GENERAL GRANT LAND?"

A. Nature of the Trust.

The state argues, essentially, that the redesignation is of no legal consequence because the state has always provided public mental health programs in the past and, implicitly, will provide them in the future. The state maintains that providing such programs fulfills its obligations according to AMHEA, freeing the grant lands for other public purposes. Textual support for this position comes from the portion of Section 202(e) which states that "proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." It is suggested that this language means Congress intended that the land grant serve as a revenue base guarantee. Great emphasis is placed on the legislative history of AMHEA which establishes that Congress did

1. The debates in the House and Senate are too lengthy to reproduce in their entirety here, but certain remarks are representative of the discussions. Senator Jackson commented that "[t]he income from sales or leases will be used to support the mental health program in Alaska. The income will be held in trust for that purpose. Any money received over and above the need for the mental health program may be used for other public purposes." He further noted that the language change was not of a fundamental nature, and thus said that, "[t]he purpose of granting 1 million acres is the same as in all other similar grants, such as the public school land-grant program." 102 Cong.Rec. 9761 (June 7, 1956).

We note that the language in the federal grant was changed from designating the proceeds of the land grant to be used as a public trust for Alaska's mental health program, to saying that the proceeds "shall first be applied to meet the necessary expenses of the mental health program" only because of worry among members of Congress that the land may actually have a

not wish to limit the use of grant lands *exclusively* to mental health programs.¹

[1] Despite these observations, we think it irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of federal land. It is a commonplace of the law that without trust property there can be no trust. Restatement (Second) of Trusts § 74 (1959).² When the state, through the legislature, altered the status of the property grant the trust was thereby effectively terminated. The state, as trustee, had no power to do this and consequently breached its duty to preserve the corpus.³ The fact that the state has provided mental health care in the past and will most likely do so in the future is no justification for termination of the trust. Whether a beneficiary can rely on the *bona fides* of a trustee to continue voluntarily to uphold the terms of a defunct trust is quite beside the point. We decline the opportunity to encourage the state, or any trustee for that matter, to determine unilaterally when to terminate a trust without specific authority to do so.

B. Remedy.

[2] Having concluded that the state breached the trust, we find it necessary on the facts of this case to invalidate the redesignation statute, Ch. 181, § 3(a), SLA (1978). *State v. University of Alaska*, 624

value far in excess of the necessary health care expenses. The record in this case shows that income from the land grant was actually less than state expenditures for mental health programs.

2. Section 74 provides: "A trust cannot be created unless there is trust property."
3. Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. See *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved federal grants to be used by states for school purposes. Those cases stand for the proposition "that the same private trust law principles are to apply to federal land granted to the states for school purposes." *University of Alaska*, 624 P.2d at 813. There is no reason to treat federal lands granted for mental health purposes differently.

P.2d 807, 815 (Alaska 1981) does not compel a different result. In that case, the federal government had granted 100,000 acres to the state "for the exclusive use and benefit" of the University. *Id.* at 811. Years after the grant, the state included 5,040 acres of the trust land in a state park. This action was not in itself a breach of the trust so long as the University was paid fair market value for the land. We inferred that the legislature intended to pay the University for this disposition, stating:

It is also logical to assume that the legislature intended to compensate the University for the loss of its land. This view gives the statute creating [the park] a reading that is in accord with the well recognized canon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity.

524 P.2d at 816.

Unlike the situation in *University of Alaska*, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in *University of Alaska*, it is not reasonable to infer that the legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in *University of Alaska* is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which com-

4. Amicus raises questions regarding the title held by conveyancers and bona fide purchasers of mental health lands. In view of our disposi-

tioned the trust when the 1973 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.⁴

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion.

MOORE, J., not participating.



In the Matter of the Application of: John L. McKAY, Jr., An Applicant for admission to the Practice of Law in Alaska and Membership in the Alaska Bar Association.

No. S-667.

Supreme Court of Alaska.

Sept. 27, 1985.

Applicant for Bar filed an appeal with Board of Governors of the Alaska Bar As-

sociation of this case, we deem it unnecessary to address those issues at the present time.

Firms may protest lands case

By BRUCE MELZER
Daily News business reporter

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

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

case, according to Peter Maassen, the companies' attorney.

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

But the oil companies

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

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

Please see Page C-6, LAND

LAND: Oil companies get OK to contest settlement

Continued from Page C-1

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

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

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

The settlement has been

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

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

Oil and gas leases aren't the only highly profile land picks the mental health lawyers have sought. Past

choices included land slated for ski resort expansion in Girdwood and Alaska's only working coal mine.

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

Other recent land picks include Dorothy Lake, an

area proposed for expanding the Snettisham project if Juneau's electrical demand increases, Lindh said.

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

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

RECEIVED JAN 22 1993

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

Fourth District
JAN 14 1993
Clark, Trial

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 contracts and when a third party has paid in full any amounts owed under the contract 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 affected. 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

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 read to Walke
CLERK: POB Hutstein
Jessie
Valland
Bjorkquist
Johannsen
Morford
Bubini
Kaestare
Mackentony
Jorgensen
Kehbock

PUBLIC LAW 830 - July 28, 1956

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

Powers of the Territorial Government

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

LAND GRANT

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

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

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

(e) All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

THE GRANTS-IN-AID PROVISION

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

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

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

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

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

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

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

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

MR. BARTLETT. When previous legislation on this matter was being considered words substantially the same as those proposed by the gentleman were offered. My understanding is that they were not incorporated in this bill for this reason: No one knows what the land is going to be worth - 500,000 acres. It might have very slight value, it might be of average value; or again, we hope it might be enormously rich land containing oil. You might arrive at a situation where, if it did have oil, you would have revenues piled up there far in excess of the needs of any mental institution. The thought was that in any case the Territory of Alaska will have an obligation to appropriate money required for the care of the mentally ill, and it was thought it would not be desirable to hobble us possibly in that manner.

MR. DAWSON. Then I am to understand that the gift of this land is not for the purpose of the mentally ill alone, but you are to use it for any purpose you want in Alaska? Is that right?

MR. BARTLETT. It might very well be, Mr. Dawson, that the land would never provide more than a fraction of the funds required for the mentally ill.

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

ALASKA MENTAL HEALTH ENABLING ACT

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

LETTERS TO THE SENATE COMMITTEE

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

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

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

. . .

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

. . .

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

MENTAL HEALTH LANDS TRUST RECONSTITUTION PROJECT OVERVIEW

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

1. Chapter 66, SLA 1991

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

- a. The establishment of a Mental Health Trust Authority (Trust Authority) to oversee the state's mental health programs and to manage the reconstituted land trust.
- b. The reconveyance to the Trust Authority of as much Original Trust land as possible, including approximately 35,000 acres of unencumbered Original Trust Land and approximately 300,00 acres of conveyable, encumbered Original Trust Land. The conveyable encumbered Original Trust Land remains subject to the encumbrance (e.g. rights-of-way, leases) and the state compensates the Trust with additional land equal in value to the value of the "interest in the land" not returned to the Trust because of the encumbrance.
- c. The conveyance of other state land to the Trust Authority, to compensate for the inability of the State to reconvey encumbered Original Trust land or interests therein. There is about 665,000 acres of non-conveyable encumbered Original Trust Land which will not be conveyed to the Trust Authority.
- d. The conveyance is, however, subject to certain restrictions; that is, to the extent practicable, the other state land should be comparable in characteristics to the encumbered Original Trust land, equal in fair market value, and generally be in the public interest for conveyance to the Trust Authority.
- e. The hypothecation of land as security to the Trust for successful reconstitution of the Trust under Chapter 66. If the reconstitution is otherwise unsuccessful, an appropriate amount of Hypothecated Land may be foreclosed under the direction of the Alaska Supreme Court or special master to complete the reconstitution.

2. Settlement Agreement

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

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

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

- a. The parties will work together to develop exchanges and will jointly share information.
- b. A process similar to the "smallest practicable tract" determinations under the Alaska Native Claims Settlement Act will be followed for Original Trust lands, the intent being to convey as much of these Original Trust lands as possible.
- c. Procedures are laid out for the valuation of lands, and a specific process is described for the exchange of properties involving the mineral estate.
- d. Hazardous materials are covered, with specific procedures to be followed in the event such materials are found on properties to be conveyed to the Trust Authority.
- e. The State will survey the lands to be conveyed to the Trust Authority within a time-frame determined by available funding.
- f. The State will convey state land by patent after survey is completed and through interim conveyance documents prior to survey and platting.

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

3. Mental Health Project

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

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

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

a. Title Research

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

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

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

- The identification of "elective" Original Trust land. This is land that the Plaintiffs may or may not wish to be conveyed to the Trust Authority.
- The identification of conveyable Original Trust land. This is land that must, under the Settlement Agreement and Legislation, be conveyed to the Trust Authority.
- The identification of encumbrances (right-of-ways, easements, etc.) on Original Trust land and replacement land. This is done to support the appraisal analyses of Original Trust land and replacement land since the State must compensate the Trust for any diminishment in value created by the State.

b. Comparable Characteristics Analyses

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

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

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

c. Value Analyses

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

- The estimates of value for 'surface land' are to be made by independent appraisers jointly selected by the parties, with value to be established through the review of comparable sales parcels by three panels that cover specific areas of the state.
- Valuations of forest resources are also to be made by independent contractors jointly selected by the two parties, with the evaluations to follow typical industry standards and methods.

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

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

d. Replacement Land Identification

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

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

e. Land Exchange Analysis

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

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

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

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

f. Surveying and Platting

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

g. Support Functions

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

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

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

h. Public Review Functions

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

i. Project Status

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

(1) Activities Accomplished

Title

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

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

Comparable Characteristics

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

Valuation Analyses - Surface and Commercial Forest

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

Replacement Land

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

Support Functions

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

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

Title

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

Comparable Characteristics Analysis

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

Valuation Analyses

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

Replacement Land

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

Land Exchange

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

Support Functions

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

J. Project Management Time-Frame

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

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

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

5. Department Order

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

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

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

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

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

5. Summary

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

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

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

GENERALIZED TIME FRAME
MENTAL HEALTH PROJECT

	FY 93		FY 94				FY 95				
	07/92	10/92	01/93	04/93	07/93	10/93	01/94	04/94	07/94	10/94	01/95
<u>Title Research</u>											
Non-Conveyable OTL Parcels	(c)										
Elective OTL Parcels	(c)										
Conveyable OTL Parcels											
Smallest Practicable Tract Analysis											
Native Allotment Analysis	(c)										
Encumbrance Analysis											
Replacement Land											
Conveyable Trust Land											
Replacement Land: Segregation from Entry											
<u>Comparable Characteristics Analysis</u>											
<u>'Land' Tracts</u>											
Non-Conveyable OTL Parcels	(c)										
Replacement Land											
Extraction Sites											
Non-Conveyable OTL	(c)										
Replacement Land											
Commercial Forest Tracts											
Non-Conveyable OTL Parcels	(c)										
Replacement Land											
Coal											
Non-Conveyable OTL Parcels	(c)										
Replacement Land											
Oil and Gas											
Non-Conveyable OTL Parcels	(c)										
Mine; 1)											
Non-Conveyable OTL Parcels	(c)										
Replacement Land			(c)								

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

	FY 93				FY 94				FY 95		
	07/92	10/92	01/93	04/93	07/93	10/93	01/94	04/94	07/94	10/94	01/95
<u>Valuation Analyses: OTL & Replacement Land</u>											
'Land'/Extraction Sites											
Sub-Parcelization ¹	(c)										
Non-Conveyable OTL Parcels			-----								
Replacement Land			-----								
Forest Tracts				-----							
Non-Conveyable OTL Parcels			-----								
Replacement Land			-----								
Mineral ²											
Di Minimus Analysis ³	(c)										
Non-Conveyable OTL Parcels ⁴											
Replacement Land ⁴											
<u>Replacement Land: Identification & Nominations</u>											
Plaintiffs ⁵		-----									
ADNR			--								
<u>Land Exchange Analysis</u>											
'Land' Parcels				--	--						
Extraction Sites				--	--						
Forest Tracts				--	--						
'Mineralized' Areas			-----								
<u>Survey/Platting</u>											
Original Trust Land											
Replacement Land									-----	-----	
<u>Hazardous Waste Assessment</u>											
Environmental Site Assessment											-----

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

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

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

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

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

Support Functions

Mapping

Hypothecated Lands

Original Trust Land

Non-Conveyable

Conveyable

Replacement Land

Geographic Information System

Information System

Title Research System

System Development

Data Upload

Comp. Characteristics/Appraisal Subsystem

System Development

Data Upload

Land Exchange

System Development

Exchange Identification

Data Repository

Repository Development

Data Upload

Mineral

System Development

Data Upload

Revenue Reporting

Original Trust Land

Hypothecated Land

Public Review Function: Replacement Land

Initial Regional Meeting(s)

Final Regional Meeting(s)

"935" Public Noticing

11(a)(2) Replacement Land Process

Affected Tract(s) Identification

Surface Value Appraisals

Subsurface Value Analyses

Preliminary Finding & Decision

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

MENTAL HEALTH TRUST PROJECT

1. Overview

This briefing summarizes and describes:

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

2. Settlement Agreement

Built around structure of Chapter 66, the Settlement Agreement:

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

Example: Survey, valuation, title processes

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

3. Mental Health Settlement Act; Chapter 66

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

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

- **Conveys other state land, to compensate for the 665,000 acres of non-conveyable Original Trust Land;**
- **Conveyance requires 'comparable characteristics' and equal value;**
- **Hypothecates (pledges) land as security for successful trust reconstitution.**

4. Mental Health Project

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

TITLE

- **Identifies non-conveyable Original Trust Land;**
- **Identifies 'elective' Original Trust Land;**
- **Identifies encumbrances (rights-of-way, easements) on Original Trust Land and replacement land;**
- **Prepares conveyable documents (interim and patent) for Original Trust Land and replacement land;**

COMPARABLE CHARACTERISTICS ANALYSIS

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

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