ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
8299 SENATE JUDICIARY

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February 3, 1993

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

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

Dear Senator Miller:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SB 67 may create an unconstitutional dedicated fund.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. **SB 67 does not protect Native allotments.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Charles E. Cole
Attorney General

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

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MEMORANDUM October 11, 1993

SUBJECT: Mental health trust lands: directing cancellation of notices of lis pendens and for another related purpose (Work Order No. 8-LS1286\A)

TO: Senator Robin Taylor

FROM: Jack Chenoweth
Legislative Counsel

The enclosed measured is drafted following points outlined in the March 11, 1993, letter of Attorney General Charles Cole, a copy of which is provided. The list of notices of recorded lis pendens derives from SSSB 65 of the Seventeenth Legislature. I drafted in accord with my understanding of the principal points of that letter in the hope that the administration would be moved to give the measure vigorous support--or at least not interpose roadblocks to its eventual passage.

Attorney General Cole's letter makes the point that there are in fact two interrelated "litigation encumbrances," the notices of lis pendens with which you are directly concerned and the trial court's July 9, 1990, preliminary injunction. This bill would set aside the encumbrances embodied in the lis pendens notice and, though you did not ask for it, further urges the attorney general to seek dissolution of the related preliminary injunction. I drafted the latter sensitive to the probable objection of the Department of Law that, for reasons relating to separation of powers and control of the litigation of the state, the agency should not be directed or ordered by the legislature to take a particular step in the management of its litigation. The interrelationship of the two litigation encumbrances is described in the March 11 letter but, if you are of the view that the inclusion of the latter in the measure is undesirable, please tell me and I will take it out.

Most of the bill's section 1 is not necessary as a matter of law. Its inclusion provides a shorthand way of informing your colleagues, many of whom may not otherwise understand the details of the ongoing mental health trust controversy, as to why passage of this particular measure is desirable. If you think the matter unnecessarily increases the bill's length, much of section 1 may be omitted.

However, according to Attorney General Cole's March 11 letter, one element of section 1 should be retained. The letter makes it clear that some reference to the legislative commitment to replace former mental health trust land now held by or transferable to third parties on an equal fair market value basis is essential if the legislation is to withstand scrutiny under the test set out in State v. University of Alaska, 624 P.2d 807 (Alaska 1981).

Before starting on this draft, I called the attorney general to ask whether he would recommend one of his assistants as someone I could work with in order to make sure all necessary points were covered. I asked in response to the invitation to do so set out at page 5 of the March 11 letter. The receptionist took my name and phone number and said that I would get an answer. I haven't. So, this is my work product based on their earlier advice to you. You may want to ship the draft back to the attorney general for comment and criticism as you further consider it.

JBC:lmb
93-197.lmb

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 11, 1993

Senator Robin L. Taylor
State Capital, Rm. 30
Juneau, Alaska 99801-1182

Re: Mental Health Trust Settlement

Dear Senator Taylor:

This letter responds to your letter dated February 23, 1993. You requested our opinion on two questions: (1) Is it possible for the legislature to change the court's ruling by removing the "liens[1]" on the mental health trust land assets and the third-party holdings, then pledging the full faith credit of the state as collateral, and (2) may the original mental health parcels which are within legislative designated areas be pledged as collateral in the mental health trust settlement? We have also reviewed the Memorandum dated February 16, 1993 from Legislative Counsel, and comment on it where appropriate.

The short answers to your questions are (1) it is possible for the legislature to remove the "liens" on the mental health trust land assets and the third-party holdings, and (2) the original mental health parcels which are within legislative designated areas may be pledged as collateral in the mental health trust settlement (and as a practical matter, they already secure the reconstitution of the trust).

1. Legislation to Remove Liens on Third-party Holdings.

The legislature may remove the "liens" currently placed on mental health trust parcels held by third-parties. The Weiss trial court permitted the encumbrances to be created on third-party holdings because it found that the mental health trust plaintiffs "would be within their rights to litigate the issue of third-party

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[1] The encumbrances on mental health parcels held by third parties which you refer to as "liens" are the notices of lis pendens recorded in various recording districts throughout the state, and the preliminary injunction issued by the trial court in Weiss v. State that precludes the state from taking actions that convey or transfer any interest in trust lands (e.g. issuing patents, land use permits, etc.). A copy of each relevant court order is attached.

rights." July 9, 1990, Memorandum Decision and Order at 10. Legislation that eliminates the Weiss plaintiffs' rights to litigate third-party rights would lead the trial court to remove the encumbrances on mental health trust lands held by third-parties.

The Alaska Supreme Court has found that the natural resources article of the Alaska Constitution (Art. VIII) vests the legislature with plenary authority over all state land, including trust lands. The legislature therefore may remove trust lands from trust status even over the objections of the trust's beneficiaries. State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981).[2] The legislature, however, must intend to compensate the trust at the fair market value for those lands removed from trust status. Id. Under this Alaska Supreme Court holding, the legislature should not need to pledge the full faith in credit of the State of Alaska as collateral to remove the third-party holdings from trust status and free them from the litigation encumbrances.

If the Alaska Supreme Court had found its holding in the University of Alaska case applicable to the mental health trust case, litigation issues relating to third-party holdings would not have arisen. The Alaska Supreme Court, however, found the legislation that removed trust lands from trust status valid in State v. University of Alaska but invalid in State v. Weiss because the court could infer a legislative intent to compensate the university trust but could not infer a legislative intent to compensate the mental health trust. The Alaska Supreme Court described the difference between the university trust case and the mental health trust case as follows:

> In [the university trust] case, the federal government had granted 100 thousand acres to the state "for the exclusive use and benefit" of the University. [citation omitted]. 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 a 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:

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[2] The University of Alaska decision is based upon the legislature's powers under the natural resources article of the Alaska Constitution. Legislation to remove third-party holdings from trust status might also be enacted under the legislature's power of eminent domain.

> It is also logical to assume 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 cannon of statutory construction that, when possible, legislation should be construed in a way that it upholds its validity.
>
> [citation omitted].
>
> Unlike the situation in University of Alaska, the present [mental health trust] case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the [mental health] trust is intermingled with the general grant lands of the state. No particular use of the [mental health] trust lands is specified and it may be years before much of the land is used. While it is 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 [mental health] trust lands by Congress, the redesignation act must be declared invalid.

State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). If the legislature explicitly expresses its intent to "compensate" the trust at "the fair market value" of third-party holdings removed from trust status, no judicial review would be required on the question of whether the court should "infer" a legislative intent to compensate the trust.

Under the University of Alaska decision, the Weiss plaintiffs will lose "their rights to litigate the issue of third party rights" as soon as valid legislation removes the third-party holdings from trust status (i.e., when the legislation is enacted that removes trust land from trust status if that legislation incorporates the legislature's intent to compensate the trust). In effect, the University of Alaska decision should be viewed as a judicial recognition of the legislature's power to direct that

trust lands be used for specific purposes regardless of trust status under a legal rationale similar to the doctrine of inverse condemnation. An inverse condemnation, generally speaking, is when the land is taken prior to the compensation being determined and paid. In this case, the third-party holdings of original trust lands would be removed from trust status on the effective date of any law providing for that result, and compensation could be determined thereafter.

In light of the history of this case, however, we anticipate that the plaintiffs would argue that the legislature lacks the authority to remove third-party holdings from trust status. Plaintiffs also may argue that the legislature must consider the trust's best interests in enacting any legislation that affects the mental health trust. We believe that a compelling case can be made that the best interests of the trust would be promoted by legislation that removes third-party holdings from trust status with the trust thereafter being compensated.[3] Litigating the validity of third-party title to original mental health trust parcels would not be in the best interests of the trust because it is unlikely (or at the very least, there is a substantial question) that the beneficiaries could ever prevail in such litigation. Furthermore, the trial court has indicated it believes that litigation of third-party rights would be a "herculean task" involving "litigation in every judicial district in this state" and necessitating "adjudicating private third-party rights to up to 3126 parcels of land, involving almost 50,000 acres of land which have been conveyed by the state." The fundamental purpose of the mental health land trust (i.e., to generate funds for mental health programs) would be thwarted through the duration of such litigation as the third-party holdings would be unable to generate any income or proceeds for the trust. Even in the unlikely event that plaintiffs ultimately were able to invalidate third-parties' title, the trust would suffer from lost income during the interim. A legislative solution that places trust assets into a productive mode sooner is in the best interest of the mental health trust.

Moreover, as counsel for dissenting plaintiffs has complained during legislative hearings regarding SB 67, increasing anger is being directed at the mental health beneficiaries who are portrayed as "hostage takers." Legislation that removes the third-party holdings from trust status is in the trust's best interest as

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[3] "Compensation" to the trust in this context could include taking into account any appropriate set-off for state mental health expenditures which the Alaska Supreme Court has found the state is entitled to assert, to whatever extent the set-off applies.

it would reduce the hostility currently suffered by the mental health trust beneficiaries.

To strengthen the state's defense to any challenges to such a legislative approach by one or more plaintiffs and/or beneficiaries, legislative findings should be made to document how the legislation is in the best interests of the mental health trust. Should you choose to pursue such an approach, we would be happy to work with the legislature and/or legislative staff on drafting specific language.

We anticipate that the plaintiffs would also argue that the litigation encumbrances (notices of lis pendens and preliminary injunction) should not be removed until the state actually pays the compensation in full. We also anticipate that plaintiffs would point out that the Weiss trial court rejected similar arguments previously made that the enactment of chapter 210, SLA 1990 eliminated plaintiffs' right to contest third-party title. See July 9, 1990 Memorandum Decision and Order at 8.

A legislative proposal freeing the third-party hostages would differ from chapter 210, SLA 1990 in that the legislature would be expressing its intent to "compensate" the trust at the fair market value of lands removed from trust status. In arguing that chapter 210, SLA 1990 did not eliminate plaintiffs' right to contest third-party title, the Weiss plaintiffs complained that the payment of 6% of unrestricted general fund revenues was not related to the fair market value of the trust land, and therefore could have been insufficient to compensate the trust. While the legislature expressed an intent to "compensate" the trust under chapter 210, an intent to "compensate" at the "fair market value" of those former trust lands could only be found if the allocation of 6% of unrestricted general fund revenues compensated the trust at the fair market value of the land. Based upon the lack of factual data before the court in July 1990, the court could not infer the legislature's intent to "compensate" the trust at the "fair market value" of land under chapter 210 as is necessary to give rise to the result in the University of Alaska decision.

In contrast, in a legislative approach to free the third-party hostages, the legislature should explicitly express its intent to compensate the trust as is required under the University of Alaska decision. The holding in that case that the legislature may remove lands from trust status over the objection of trust beneficiaries would then apply and the trial court should then remove the litigation encumbrances on third-party holdings.

The Weiss plaintiffs may also argue that the trial court has stated "that the state may not unilaterally settle this

lawsuit." See, July 9, 1990, Memorandum Decision and Order at 8. That argument is easily rebutted. Such legislation would not be an attempt to "settle" the lawsuit because a settlement necessarily requires the mutual agreement of both sides. The legislation instead would "resolve" that portion of the litigation that relates to the possibility that plaintiffs may, someday, seek to litigate rights to third-party holdings[4] through the exercise of the legislature's constitutional authority -- and the legislature's authority under the Alaska Mental Health Enabling Act.[5] The University of Alaska decision provides that the legislature may remove lands from trust status over the objection of trust beneficiaries if the trust is fully compensated. There is no logical basis for restricting that legislative power merely because the plaintiffs may, someday, decide they want to assert claims to the lands against the third-parties. Nothing would preclude the legislature from exercising its legislative power to remove the

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[4] While the trial court in July 1990 held that Weiss plaintiffs would be within their rights to litigate third-party title, no claims have been made since and none were previously made during the course of this litigation that began in November 1982. In fact, plaintiffs have opposed attempts by third-parties to litigate and clear title to the third-parties' land.

It should be noted that the Weiss plaintiffs have had little incentive to litigate third-party interests. The state in chapter 66, just as in previous statutory attempts to resolve the Weiss litigation, did not assert the "set-off" to reduce compensation to be paid to the trust. Even if plaintiffs would successfully upset each and every sale to third-parties, they would not become entitled to any greater recovery than what the state has previously offered in settlement. On the other hand, if plaintiffs attempted to litigate third-party title issues and were unsuccessful in any number of cases, the plaintiffs acknowledge that the "set-off" would apply to reduce the amount of compensation the trust could possibly recover. Thus, the plaintiffs have had little to gain and a tremendous amount to lose by actually litigating any third-party issues.

[5] Section 202(e) of the Enabling Act provides, in part:

> [Mental health trust] 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 [State] of Alaska.

lands from trust status even after plaintiffs might successfully challenge third-party title, an event unlikely to ever occur. There is no logical basis as to why the legislative power is in any way limited before Weiss plaintiffs commence litigation over third-party title.

The "compensation" equal to the "fair market value" of trust land that must be provided need not be made in a monetary payment. The Alaska Supreme Court also held in the University of Alaska decision that the state and trust "should be given an election to pay monetary damages or arrange a mutually agreeable land exchange." State v. University of Alaska, 624 P.2d at 816. In the university trust case, of course, the compensation has largely been through land exchanges.

Legislative counsel suggests that pledging the full faith and credit of the state to free third-party holdings may give rise to constitutional problems under Article IX, § 6 (the "public purpose" clause) and under Article IX, § 8 (the "state debt" clause). While we have not completed our research, it is our preliminary view that neither of these potential constitutional problems would arise because the suggested legislation addresses existing state obligations to the mental health trust and third-parties, and does not give rise to a public satisfaction of private debt obligations.

The Alaska Supreme Court has already found that the state breached the mental health trust and ordered that the trust be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. General grant lands which were once mental health lands would return to their formal trust status. In the event that exchanges had been made, properties traceable to an exchange involving mental health lands would also be returned to trust status. For former mental health lands that had been "sold", the state must reimburse the trust for the fair market value at the time of sale. In calculating the total amount owed, the Supreme Court granted a set-off for mental health expenditures made by the state during the same period. If the set-off exceeded the value of land sold, no further cash compensation was necessary as part of the reconstitution. State v. Weiss, 706 P.2d at 684.

The Supreme Court decision left uncertain the treatment of original trust land parcels held by third-parties who had contracted to purchase the parcel from the state. If those parcels were "sold," the state is obligated to compensate the trust for the fair market value of the property, minus any applicable set-off. If the property was not "sold," the parcel itself arguably should be reconstituted into the trust. For each of these third-party

parcels, therefore, the State of Alaska has an existing debt obligation to the mental health trust to either deliver the parcel or pay cash compensation, subject to a set-off. Either of these remedies would compensate the trust for the breach of trust arising from the improper disposal of trust land (i.e. the disposal under the 1978 redesignation legislation).

To obtain satisfaction of this debt obligation, the trust (represented by Weiss plaintiffs) may seek compensation from the trustee (the State of Alaska) or may attempt to reobtain trust parcels from the third-parties. In either event, however, the trust may only obtain a single compensation. The trust may not reobtain the parcel and then obtain cash compensation for loss of the parcel. However the compensation is obtained, the obligation that would be satisfied would be the state's obligation to the mental health trust arising from the 1978 redesignation legislation.

Furthermore, should the trust take land away from third-parties, those third-parties might have claims against the state for breach of the contracts to convey the land to those third-parties. Thus, legislation that validates the third-parties' interests in land and pays compensation for the land eliminates both the state obligation to the mental health trust and avoids a potential state obligation to third-parties for breach of contract.

Because the legislation would both satisfy a currently existing state obligation -- as has already been determined by the Alaska Supreme Court -- and would avoid a potential additional state obligation to third-parties who have obtained interests in trust land from the state, we believe that neither the public purpose nor the state debt clauses of the Alaska Constitution would be violated.

2. Trust Parcels Within Legislative Designated Areas as Collateral for the Reconstitution of the Trust.

Your second question concerned the pledging of original mental health parcels which are within legislative designated areas ("LDAs") as collateral for fulfillment of the state's obligations under any approach to resolve this litigation. We believe that lands within LDAs could be pledged as collateral, and, in effect, already do secure the reconstitution of the mental health trust.

Under chapter 66, the legislature clearly intended to prevent any possible return of lands within LDAs to the trust, and therefore did not pledge them as security. The purpose for the hypothecation of lands was to guarantee that the state would timely complete the reconstitution under chapter 66. If the

reconstitution is not otherwise completed, those hypothecated land parcels necessary to complete the reconstitution would be foreclosed and conveyed to the trust authority. This security guarantees that all original trust lands that are to remain in state ownership or that are to have state conveyances validated under chapter 66 could never be lost to the mental health trust (e.g., lands within LDAs and lands the state has conveyed to third-parties -- such as municipalities, native corporations, and "moms & pops").

Nevertheless, original trust lands generally remain subject to trust claims until an exchange is completed during the reconstitution process. If an exchange is not completed for any such parcel, and the foreclosure of hypothecated lands failed to complete the reconstitution, the Weiss plaintiffs could reassert claims to original trust lands and complete the reconstitution with those original trust lands (e.g., lands within LDAs for which exchanges had not occurred). Thus, until the reconstitution is accomplished, the original trust land parcels within LDAs remain subject to potential trust claims, could be used to complete the reconstitution if necessary, and therefore are, in effect, currently pledged to secure the reconstitution of the trust.

We hope this answers your questions. Please contact me or my staff if we can be of any further assistance in any matters related to the mental health trust litigation.

Very truly yours,

Charles E. Cole
Attorney General

BDB/sh

cc: Brian D. Bjorkquist
G. Thomas Koester
Wendy S. Feuer
Jack Chenoweth, Legislative Counsel
David Walker
James B. Gottstein
Philip Volland
Jeff Jessee

STATE OF ALASKA
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FAX TRANSMITTAL SHEET

Please deliver the following pages:

DATE: 4/16/93 **TIME:** 9:00 **TOTAL NO. OF PAGES** 5 (including cover sheet)

TO: Kenny Leaf **FAX NO.** 465-3922

RE: Mental Health Trust: refunds to purchasers

FR: Brian D. Bjorkquist
Assistant Attorney General

* *

IF YOU DO NOT RECEIVE ALL THE PAGES OR HAVE ANY PROBLEMS, PLEASE CALL SHERI AT (907) 269-5251. THANK YOU.

REMARKS:

Attached find a copy of the Directors Decision dated July 24, 1992, as amended September 15, 1992, related to refunds to purchasers of mental health trust parcels. If Senator Taylor's constituent desires further information, please have him or her contact Bob Baker at DNR, Division of Land, Contract Administration (Phone Number 762-2230). Mr. Baker can review the constituent's file, determine his or her eligiblity, and calculate the amount of refund that would be given. If you have further questions, please feel free to contact me.

cc: Bob Baker (w/o encl)

MEMORANDUM

State of Alaska

Department of Natural Resources
Division of Land

TO: DIRECTOR'S POLICY FILE
DPF 93-02

DATE: July 24, 1992

FILE NO:

THRU:

TELEPHONE NO:

SUBJECT: Refunds to Purchasers of Mental Health Land

FROM: RON SWANSON
Director

BACKGROUND:

Numerous individuals have purchased from the State of Alaska land which was selected and patented to the State under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956). This original Mental Health Land is subject to a preliminary injunction requested by the plaintiffs in the Mental Health Trust Litigation, Weiss v. State, 4FA-82-2208 Civil. The injunction temporarily prevents the State of Alaska from issuing patents or other documents or taking any further steps which convey or transfer mental health trust land or any interest therein.

PURPOSE:
The purpose of this DPF is to establish a policy and identify the criteria to be used when purchasers of original Mental Health Trust Land request refunds of purchase monies paid in exchange for relinquishment of the parcel(s).

DISCUSSION:
The main benefit to DNR is that refunds will avoid reconstitution expenses and efforts. Saved expenses include litigation and reconstitution costs, plus the value of the land that otherwise must be substituted for the original trust land under Chapter 66. Avoiding reconstitution efforts is a particular benefit as to settlement land, for which the State will have the most difficulty locating replacement land.

The Attorney General has indicated that the Director has the discretion or authority under 11 AAC 54.340, 11 AAC 54.400 and other applicable law, to negotiate terms to cancel land sale contracts, if the purchaser is in good standing. The negotiation cancellation can include a term that limits refunds to amounts less than the value of the parcel. By limiting the refund to amounts less than the value of the parcel, DNR will benefit from the agreement to refund.

Any refund will be made out of the fund(s) in which the original payments were made. Much of these refunds will come from General Fund and School Trust Fund because most of the contracts were established prior to the Weiss decision and purchase monies were deposited into those funds pursuant to Department Order 121 (revised).

Should the State refund all the principal and interest paid? The interest paid on any land sale contract can be equated to a rental or use fee. Refunds which included all the principal and interest paid by purchasers would give them "free use" of the land. Purchasers do have an equitable interest in the land, which is directly reflected in the amount of principal owed that has been reduced over the life of the contract.

Any purchaser who is granted a refund and relinquishes their parcel would also lose their 38.05.940 or 38.05.058 discount, if one had been granted.

Prior to any refund being considered the parcel would require a Phase I Environmental Audit and comment from Weiss plaintiffs about the refund will be solicited.

There are at least two possible detriments to providing refunds on a larger basis. First, the refunds transform the settlement under Chapter 66 from a strict land settlement to a partial monetary settlement. The amount of refunds requested could become excessive if too many third parties made such requests. DNR's discretion to negotiate cancellation of purchase contracts on a case-by-case basis under 11 AAC 54.340, 11 AAC 54.400, and other applicable law, however, should allow DNR to reject a refund offer if the cash drain becomes excessive.

Second, if Chapter 66 is not approved, the refunds could worsen the State's position in continued litigation or under an alternative settlement. For example, if the court in further litigation would have found these parcels to be "sold" damage claims would have been subject to an offset under the Alaska Supreme Court's 1985 Weiss

decision. The refund for relinquishment deal returns the land to State ownership so that it could be reconstituted to the trust without an offset. The loss of the offset here, if it occurs, will be limited to those relatively few third parties who enter into a refund deal. If this number becomes excessive, DNR can reconsider its policy.

Policy:

The Division of Land will refund monies to purchasers of original Mental Health land using the following criteria.

1. Comments from the Plaintiffs will be solicited.

2. The parcel must be inspected and found to be free of any environmental contamination.

3. The purchasers lose any discount granted under AS 38.05.058 or AS 38.05.940.

4. Service charges, fees and interest will not be refunded.

5. Purchasers will be refunded all monies applied to the principal minus any discounts or any non-cash credits granted pursuant to Alaska Statutes.

6. Purchasers account must be current and the contract in good standing to be considered for a refund.

7. Purchasers who have paid off their contract and have already received a patent will not be eligible for a refund.

MEMORANDUM

State of Alaska

Department of Natural Resources
Division of Land

TO: DIRECTOR'S POLICY FILE
93-02, Amended

DATE: September 10, 1992

FILE NO:

THRU:

TELEPHONE NO: 762-2692

SUBJECT: Refund

FROM: Ron Swanson
Director

I hereby amend DPF 93-02, adopted July 24, 1992 to provide for a use fee equivalent to 7.5 percent per annum of the original purchase price for the time during which the purchaser had possession of the property.

The Division of Land will refund monies to purchasers of Mental Health land using the following criteria.

1. Comments from Plaintiffs will be solicited.

2. The parcel must be inspected and found to be free of any environmental contamination.

3. The purchasers lose any discount granted under A.S. 38.05.940.

4. Service charges and fees will not be refunded.

5. Purchasers will be refunded all monies applied to the principal minus any discounts on any non-cash credits granted pursuant to Alaska Statutes.

6. Purchasers may be refunded a portion of monies applied to interest, minus an amount equivalent to 7.5 percent per annum (this is equivalent to a lease rate) of the original purchase price for the time during which the purchaser had full use and possession of the property (which is identified as up to the date of the injunction, July of 1990).

7. Purchasers account must be current and the contract in good standing to be considered for a refund.

8. Purchasers who have paid off their contract and have already received a patent will not be eligible for a refund.

MENTAL HEALTH LANDS TRUST
THE OFFSET

Attorney General Cole has stated that in Chapter 66 "the state gave up a $1.3 billion offset which the Alaska Supreme Court held that the state is entitled to". (Letter to Senator Mike Miller dated February 3, 1993).

However, the ***Supreme Court <u>actually</u> said*** that "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 the expenditures exceeded the value of lands **sold** , the state need not furnish cash as part of the reconstitution." (<u>State v. Weiss,</u> 706 P. 2nd 681 at 684.) (emphasis added).

<u>SO, WHAT IS THE OFFSET?</u>

The value of the offset would depend on the outcome of lengthy litigation over how much the State has actually spent on mental health and whether any of the land was legally "sold".

The Interim Mental Health Trust Commission estimated the offset at only $200 million.

The State has inflated the offset to $1.3 billion by including expenditures of the Dept. of Law, D.N.R., Dept. of Administration, etc. *<u>in addition to</u>* program costs. (At the same time the State claims the entire 1,000,000 acres of land is worth only $565 million.)

"SOLD"?

Returnable Land 315,000 acres	Must be returned to the trust.
Encumbered 150,000 acres	Can be returned subject to encumbrances.
Legislatively Designated Areas (LDAs) 370,000 acres	Set aside by legislature for parks, wilderness, forests, etc.
Municipalities 83,000 acres	Paid nothing. Had actual notice of breach of trust.
Settlement 40,000 acres	Traceable land to be returned to trust.
Moms & Pops 50,000 acres	Paid value. Notice of trust status in record of title.

3/1/93

SB 67 MENTAL HEALTH TRUST AMENDMENTS
PROPOSED SCHEDULE OF TESTIMONY

DEPARTMENT OF LAW

CHARLIE COLE
TOM CUSTER
BRIAN BJORQUIST (teleconference from Anchorage)

NONSETTLING PLAINTIFFS

BOB STILES
JEFF JESSE
TOM WALDO - Sierra Club
PETER MAASSEN - UNICAL (teleconference from Anchorage)
CHARLIE BODEY - Usabelli (teleconference from Fairbanks)

SETTLING PLAINTIFFS

JIM GOTTSTEIN (teleconference from Anchorage)
DAVID WALKER

ANOTHER HEARING FOR SB67 HAS BEEN SCHEDULED FOR MONDAY, MARCH 8.

MENTAL HEALTH LANDS TRUST

Chapter 66 Amendment
SB 469/HB 584

BRIEFING PACKET

MENTAL HEALTH LANDS TRUST
PROPOSED ALTERNATIVE SETTLEMENT

The Chapter 66 proposal for settlement faces a lengthy and uncertain future in the courts. It is opposed by many Alaskans. The unavoidable delay in its approval will severely limit development on 7.7 million acres of land when oil revenues are declining. The goal of this alternative is to reach a settlement that is acceptable to all Alaskans. This would avoid further litigation and the resulting restriction on land use and provide a basic level of funding for the Mental Health Program. Most importantly, it would not require a cash payment from the State to settle this issue.

This new proposal is a mixed land/income stream approach which incorporates the Trust Authority developed for Chapter 66.

THE LAND

In this new proposal, like Chapter 66, nearly half of the original Trust lands will be returned to the Trust. This is the least valuable of the original lands. The Trust would take these lands subject to all third party interests such as leases or rights of way.

Unlike Chapter 66, income from this land would be placed in a cash corpus account and invested like the Permanent Fund. The income from this principal would be deposited in the Trust income account and be available each year to support the Mental Health Program. This is the mechanism used in the University of Alaska Land Trust Settlement.

INCOME STREAM

This new proposal incorporates existing law where 6% of unrestricted general fund revenue would continue to be allocated to the Trust income account. This would provide a continuing and dependable source of funds available for the Mental Health Program. It is tied directly to overall State income.

Each year the money available to fund the Mental Health Program would include this 6% plus any earnings from the cash corpus account. Any of this money not needed to meet the necessary expenses of the Mental Health Program will be returned to the State general fund.

TRUST MANAGEMENT

As in Chapter 66, a Trust Authority appointed by the Governor would manage the land and cash corpus account. In addition, it would make recommendations to the Governor and the Legislature on how to spend available funds.

NONRETURNED TRUST LANDS

When the new proposal is approved, all lands owned by third parties, including Municipalities, will be immediately and permanently released from claims by the Trust. Original Trust lands which are now in Legislatively Designated Areas, such as State parks, would serve as security for the State's promise to allocate the 6%. The State would still own these lands and continue to manage them according to their designation.

ADVANTAGES

*The main advantage is that this proposal could build a consensus leading to the fastest final resolution possible.

*Each element of this new proposal is either in existing law or has universal acceptance as part of a Trust settlement. This dramatically reduces the possibility of a long and difficult approval process.

*It eliminates any restriction on the additional 6.7 million acres of State land held hostage by Chapter 66.

*This new proposal will generate wealth from two sources. First, the land will be used to generate money. Then this money will be invested like the Permanent Fund and would increase over the years. It is this capacity to increase earnings over time which may make the 6% income stream acceptable to the beneficiaries despite the coming reduction in State income.

*The cash corpus will grow over time and reduce the Mental Health Programs dependence on the General Fund. The massive land driven Trust envisioned in Chapter 66 would spend all that it earns every year and could never fund the Mental Health Program.

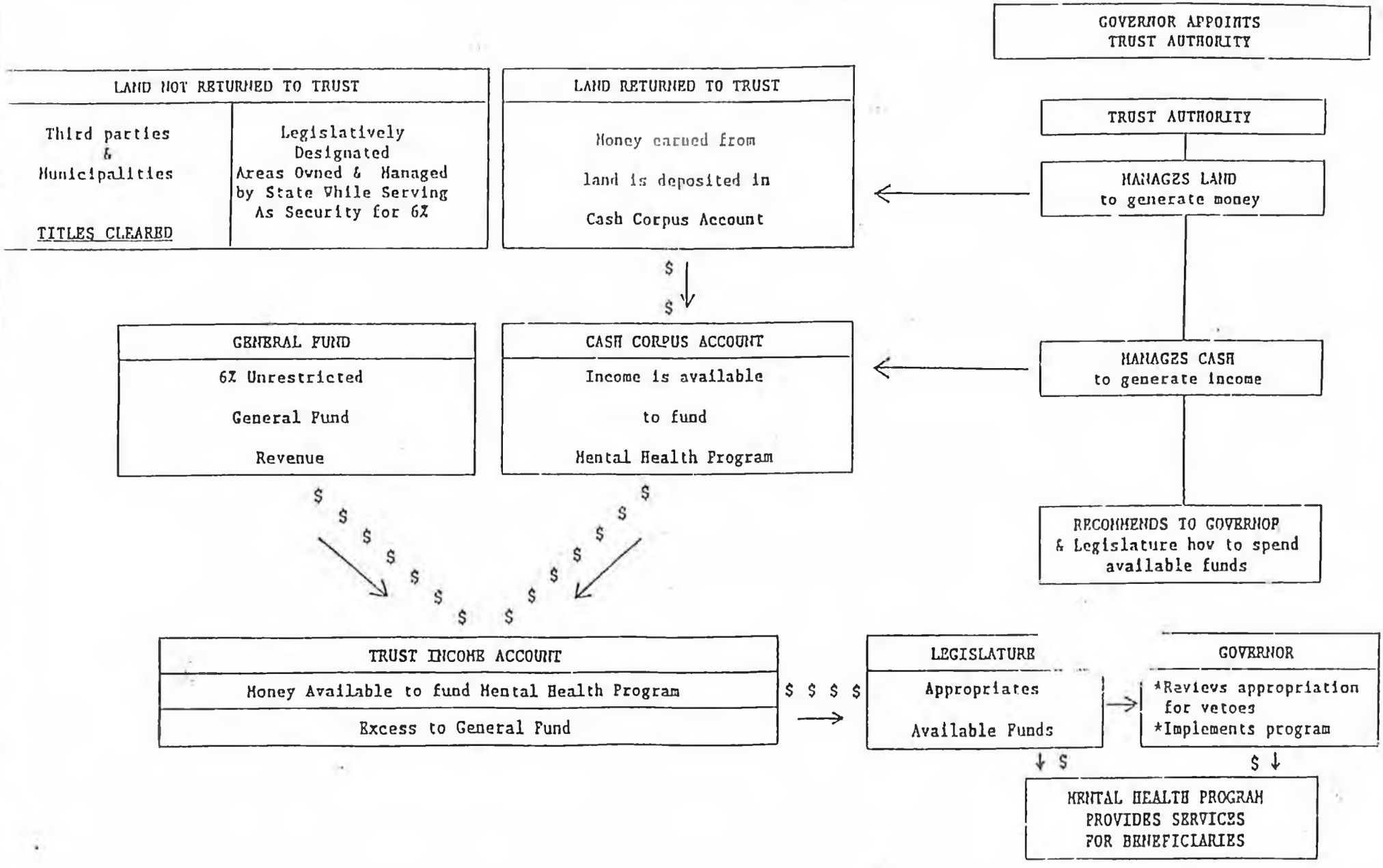
*The 6% allocation is currently in effect and is working. It goes down as State income goes down. The Office of Management and Budget (OMB) estimates the cost of the current Mental Health Program at $145 million. Although the 6% is estimated to generate only $116 million in FY 93, it will at least provide a base level for funding the Mental Health Program.

*The Constitution requires that 25% of the earnings from State land be placed in the Permanent Fund. Chapter 66 would place over a million acres of State land into the Trust. No contribution to the Permanent Fund would be made from this land. The new proposal would eliminate this problem and avoid any reduction in Permanent Fund dividends.

CONCLUSION

This new proposal offers the quickest, least expensive and most acceptable solution to a problem that we must all put behind us.

NEW PROPOSAL



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, 1992. 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. <u>Project Status</u>

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

(1) Activities Accomplished

Title

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

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

Comparable Characteristics

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

Valuation Analyses - Surface and Commercial Forest

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

Replacement Land

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

Support Functions

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

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

Title

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

Comparable Characteristics Analysis

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

Valuation Analyses

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

Replacement Land

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

Land Exchange

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

Support Functions

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

J. Project Management Time-Frame

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

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

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

5. Department Order

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

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

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

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

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

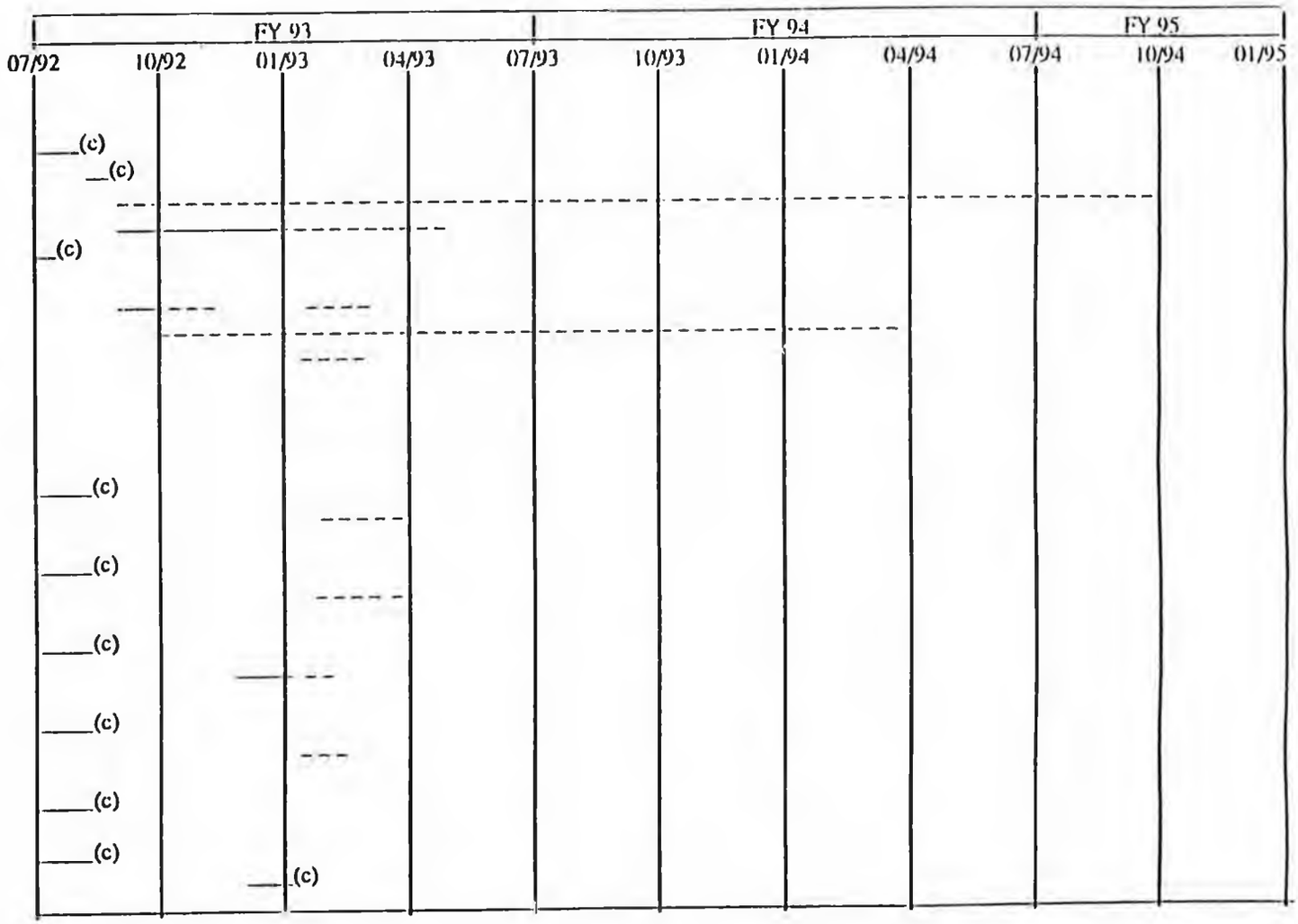
5. Summary

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

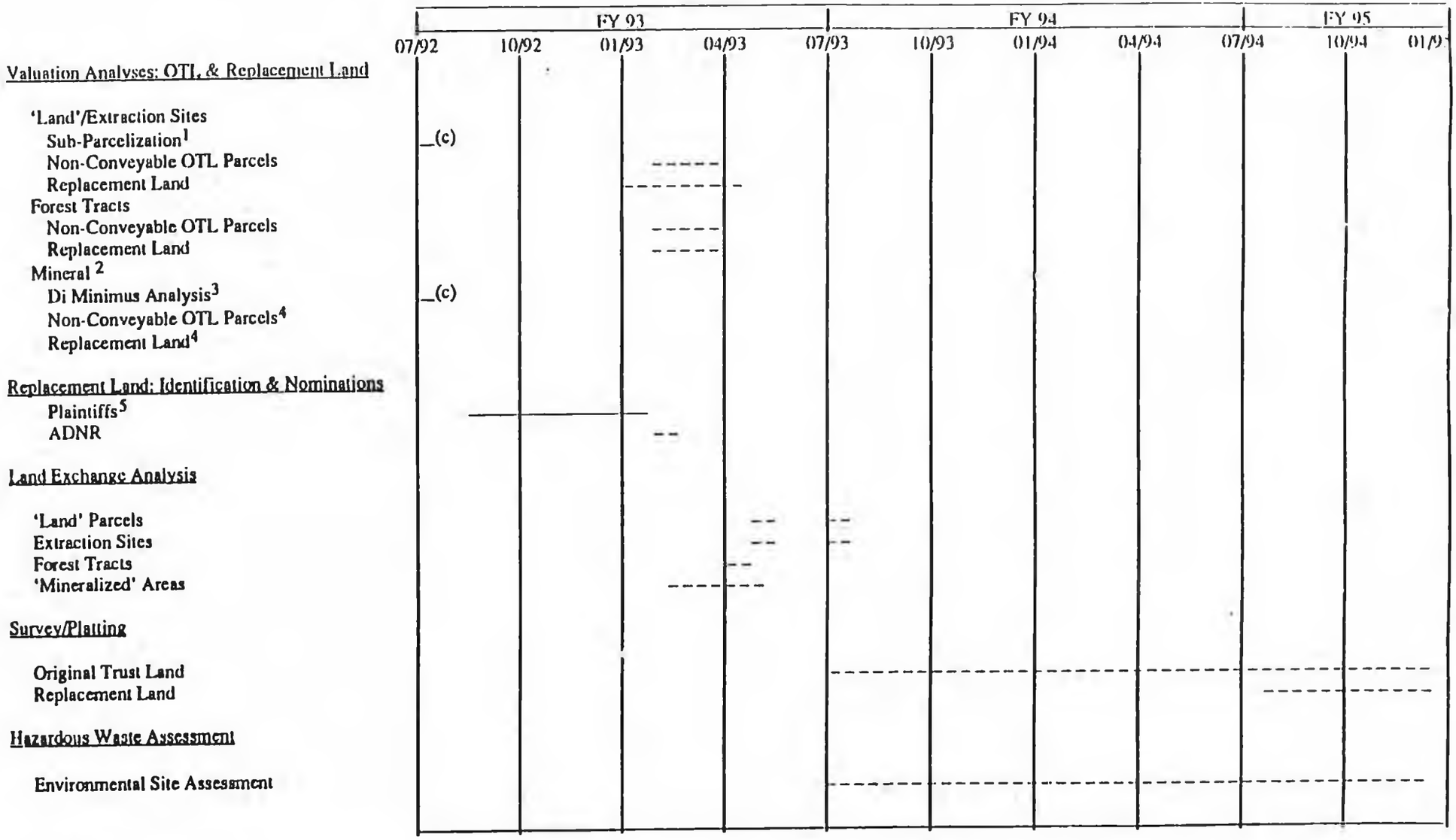
The period between January through May, 1993, will be a critical time for the Project and, therefore, for the successful resolution of the Mental Health Trust lands dilemma that has affected the State for so many years.

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

GENERALIZED TIME FRAME
MENTAL HEALTH PROJECT



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



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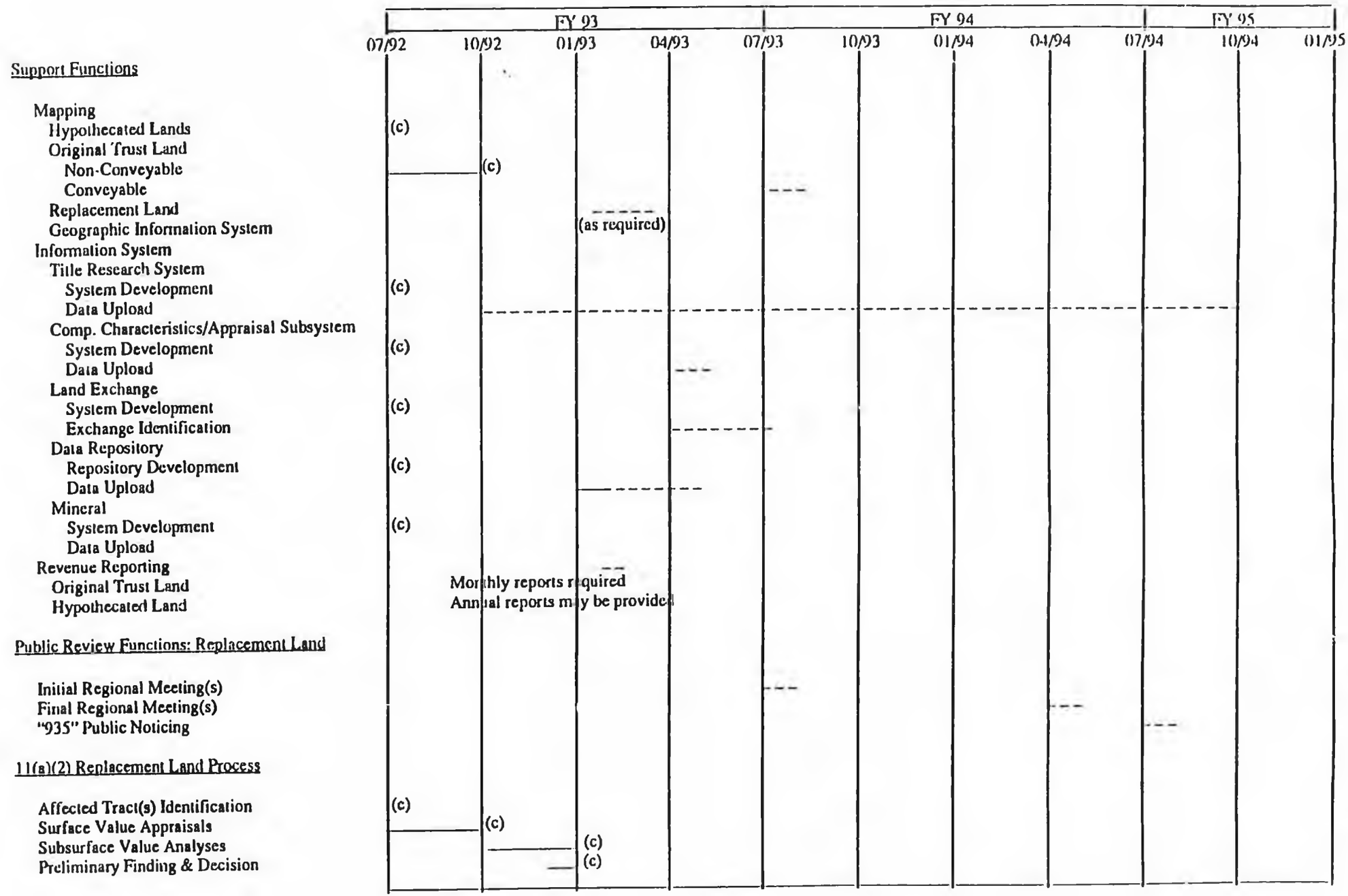
[1] Sub-parcelization refers to the creation of smaller parcels within larger tracts for purposes of identifying a general unit area of development or of sale.

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

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

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

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


FY 93
FY 94
FY 95
07/92
10/92
01/93
04/93
07/93
10/93
01/94
04/94
07/94
10/94
01/95
Support Functions
Mapping
Hypothecated Lands
Original Trust Land
Non-Conveyable
Conveyable
Replacement Land
Geographic Information System
(as required)
Information System
Title Research System
System Development
Data Upload
Comp. Characteristics/Appraisal Subsystem
System Development
Data Upload
Land Exchange
System Development
Exchange Identification
Data Repository
Repository Development
Data Upload
Mineral
System Development
Data Upload
Revenue Reporting
Original Trust Land
Hypothecated Land
(c)
Monthly reports required
Annual reports may be provided
Public Review Functions: 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

MENTAL HEALTH LANDS TRUST
BRIEFING PAPER

SB 67 Fabor ... SB 126

March 1, 1993

This information is provided by the Alaska Coal Association, the Alaska Center for the Environment and Advocacy Services of Alaska

1956 - THE FEDERAL GRANT

During territorial days, the federal government imposed a barbaric mental health system on Alaskans. People who experienced mental disabilities such as Alzheimer's disease, mental retardation and mental illnesses were tried and convicted of the crime of being an "insane person at large". After conviction, they were sent to Morningside Hospital in Oregon where the federal government paid the bill.

Over time, Alaskans became more and more outraged over this treatment. In addition, impending Statehood meant that Alaska would need to assume responsibility for administering and funding its own mental health program. Finally, in 1956, Congress passed the Alaska Mental Health Enabling Act, granting authority to the Territory of Alaska to administer its own mental health program. To provide funds to operate the program, Alaska was granted the right to select ***one million acres of land*** to be administered as a ***public Trust.***

Recognizing that the purpose of the Trust was to earn income, the Territory, and then the State of Alaska selected land that was believed to be the most valuable property in the State. These included urban and suburban lands in Anchorage, Fairbanks, Juneau, Sitka, Ketchikan, Petersburg, Wrangell, Haines, Homer, Kodiak and Skagway. Also selected were lands on the Kenai peninsula, in the Matanuska and Susitna Valleys and in Kachemak Bay. High value resource lands were also selected, such as 60% of what is now known as the Haines State Forest, forest lands at Cape Yakataga, a significant percentage of the known coal resources, oil and gas prospects, and prime mineral districts of the State. These lands were selected because they were best suited to the production of income in perpetuity.

Although the land was selected for the Trust, and was supposed to earn money in support of the mental health program, the State Division of Lands received no direction on managing the Trust lands as a Trustee. As a result, no Trust administration was established, and no trust fund was created. In this vacuum some of the land was improperly disposed of and no proper accounting of Trust funds was made.

1978 - THE GREAT LAND THEFT

Due to the valuable nature of the land, there was tremendous pressure by municipalities and individuals to make Mental Health Trust Lands available for other purposes. In response to this pressure, in 1978 the Alaska Legislature attempted to abolish the Trust by "redesignating" Mental Health Trust Lands as general grant lands. In exchange, the legislature was supposed to compensate the Trust with 1.5% of revenues from ***all*** State lands. However, not a single payment to the Trust account was ever made.

1982 - THE ORIGINAL LAWSUIT

An attempt was made to get the legislature to correct this blatant violation of federal law and the State's obligation as a Trustee. After being told "we don't care if it is illegal - sue us", the Alaska Mental Health Association sponsored the beginning of the litigation in 1982. Vern Weiss, on behalf of his son Carl, and Earl Hilliker, on behalf of themselves and the class of people entitled to benefits under the Trust (beneficiaries of the Trust) were named as plaintiffs in the lawsuit. Since that time, the Alaska Mental Health Association, representatives of the mentally retarded and mentally defective (developmentally disabled), and representatives of chronic alcoholics with psychosis have formally intervened to participate with the original plaintiffs in the lawsuit. Elderly people with dementias, such as Alzheimer's disease, are also beneficiaries of the Trust.

1985 - THE ALASKA SUPREME COURT DECISION

In 1985, in what is known as the Weiss Decision, the Alaska Supreme Court rejected the State's arguments that there really was no Trust. The Court ordered that the "trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective".

At the time of the Weiss Decision, the following legally questionable actions had been taken by the State with respect to Mental Health Trust Lands:

370,000 acres	Designated as state parks, refuges, etc.
83,000 acres	To Municipalities
36,000 acres	To Native corporations
50,000 acres	To individuals ("Moms & Pops")
3,000 acres	To the University of Alaska, and
150,000 acres	Encumbered land
692,000 acres	Total

Obviously, determining which of these lands could be returned to the Trust would involve years of litigation. Returning these lands would create incredible hardship for thousands of innocent third parties and disrupt decades of land use planning efforts. This began what has become years of unsuccessful efforts to reach a settlement as a way to avoid this court ordered mandate to return the original land to the Trust.

1987 - SETTLEMENT ATTEMPT #1 CHAPTER 48

Chapter 48 would have determined the fair market value of the original one million acres under procedures approved by the Interim Mental Health Trust Commission set up by the State. The State would then "rent" the Trust lands in perpetuity for 8% of their value. As security, the Trust would have been made whole with legislatively designated lands of equal value to those Trust lands illegally disposed of by the State. The Alaska Mental Health Board was created to determine the needs of the mental health program and make recommendations regarding necessary funding for the mental health programs to the Governor and Legislature.

1990 - THE OBSTRUCTION TO IMPLEMENTATION OF CHAPTER 48

The Interim Mental Health Trust Commission worked from the passage of Chapter 48 until January of 1990 to determine and approve the appropriate valuation procedures to implement Chapter 48. On November 7, 1989, the Commission adopted by a two to one vote (the State's representative dissenting) its final approved procedures for determining the value of the original Mental Health Trust Lands. Utilizing these approved procedures the value of the Mental Health Trust Lands, as of September 7, 1987, is $2.243 billion. However, on January 23, 1990, the State Department of Natural Resources announced a creative interpretation of Chapter 48 that the Commission could not approve any valuation procedures that the Commissioner of Natural Resources did not accept. On February 1, 1990, the Department of Natural Resources issued its Minority Recommendations, indicating it believed the value of the Trust Lands was only $565 million. The Commissioner of Natural Resources then declared an "impasse".

1990 - SETTLEMENT ATTEMPT #2 SENATE BILL 493

During the 1990 legislative session, a bill was introduced which would have adopted the $2.243 billion value for the Trust lands and implemented Chapter 48. However, in the closing hours of the session, a Finance Committee substitute was passed which changed the compensation from 8% of the value of the Trust lands to a permanent 6% of unrestricted general fund revenue.

The Beneficiaries commissioned an economic analysis of changing the form of compensation from the value of the land to a percentage of declining state revenues. Not surprisingly, the Beneficiaries believed that this change seriously under compensated the Trust.

This, together with the lack of security for the promise to pay and the lack of an adequate Trustee, led the beneficiaries to reject this unilateral attempt to settle the litigation.

1990 - THE LAND FREEZE AND ITS CONSEQUENCES

Faced with yet another example of the State breaking it's promises and breaching its responsibilities as a Trustee, the Beneficiaries went back to court for an injunction that would prohibit the State from transferring or issuing any permits or leases on Mental Health Trust lands. The Court granted the injunction which held that the Beneficiaries were entitled to challenge the status of previous dispositions of Mental Health Trust lands.

The Beneficiaries' attorneys believe that a third party does not receive good title to Mental Health Trust Lands unless that party *paid value* for the land and *had no reason to know of the breach of trust*. They believe that all persons will be found to have "constructive knowledge" of the breach of trust because it was a matter of public record.

The difficulties that third parties are now experiencing are the difficulties the State, the Beneficiaries and others have tried to avoid by continuing to look for a settlement to this issue.

THE INNOCENT THIRD PARTIES CAUGHT IN THE CROSSFIRE

There are over 6,000 questionable actions that have occurred on Mental Health Trust Lands that are open for reversal. Prospective activities on Mental Health Trust Lands have been suspended, or are in limbo. For example, the Wishbone Hill Coal Mining Project has been put on hold pending determination of certain legal questions. Usibelli Coal Mine operates substantially on Mental Health Trust Lands and its future operations are planned to be substantially on Mental Health Trust Lands. The Diamond Chuitna Coal Project in the Beluga Coal Field is also on hold. People who have received patents to Mental Health Trust Lands, like the Moms and Pops, may lose their land[1]. Lessees of Trust lands may have their leases declared invalid. Municipalities which received Trust lands face the possibility of losing the land despite the fact that they've already spent time and money in planning for its use.

1991 - SETTLEMENT ATTEMPT #3 CHAPTER 66

During the 1991 session, legislation was once again introduced in an effort to reach a settlement. Lengthy negotiations with the Legislature resulted in the agreement to create a Mental Health Trust Authority to serve as a Trustee. However, the Administration refused to consider a cash based settlement. With less than two weeks left in the session, the Administration and three of the four plaintiff groups began negotiating what would become Chapter 66. Chapter 66, if approved, would:

1) Create the Mental Health Trust Authority as Trustee.

2) Return as much of the original Trust land as possible to the Trust.

3) Exchange other comparable state land for original Trust land that cannot be returned.

4) Begin the exchange process before Chapter 66 is approved by the courts pursuant to a Settlement Agreement negotiated by the parties after the session.

5) Hypothecate (pledge as security) 6.7 million acres of State land to be foreclosed upon in the event the land exchange is not completed before December of 1994.

6) Become effective only after the settlement is finally approved by the courts, the Weiss case is dismissed, and the time for any appeals has expired.

1 On the other hand, the Beneficiaries have tried to eliminate unnecessary hardship, and when no harm to the trust is apparent, the Beneficiaries have uniformly agreed to modify the injunction to allow things to proceed.

1991 - LAWSUITS OVER CHAPTER 66

In October of 1991, a group representing tourism, sport fishing, environmental and other public interests sued to intervene in the lawsuit. They believe that Chapter 66 violates State law, the State Constitution, and the Statehood Act. They object to transferring to the Trust hundreds of thousands of acres of multiple use public lands that were never in the original Trust. They also object to nullifying numerous state land use planning processes in which thousands of Alaskans participated in good faith. The intervention was expected and initially welcomed by the settling parties as they believed that favorable decisions on these issues would "bulletproof" the settlement against challenges after approval. Unfortunately, the settling parties failed to understand how long these issues would take to resolve and the consequences in the meantime.

After over a year and a half, these challenges are still pending in the Superior Court. A decision is not expected until the spring or summer of 1993. The losing party will then, no doubt, appeal to the Alaska Supreme Court. After that appeal, the losing party can then ask the U.S. Supreme Court to review the Statehood Act issue relating to the ability of the State to transfer the mineral estate to the Trust as a part of the exchange. Only after all of this litigation is concluded can the courts finally approve or disapprove Chapter 66. While nobody can predict how long this will all take, it is safe to assume that it will be measured in years not months.

To make matters worse, during the exchange process, the plaintiffs discovered that the ***State did not have lands comparable to those which would be lost***. Therefore, they were forced to look to income producing lands which the State had not anticipated would become involved in the exchange process. The Cook Inlet oil and gas fields, Glacier/Winner Creek in Girdwood, Leask Lakes in Ketchican, hydroelectric sites throughout Southeast Alaska, airport lands and the proposed site for the new Capital building in Juneau are just a few of the lands which may have to be placed into the Trust.

Most recently, in response to these actions, the Cook Inlet oil and gas producers, Marathon and Unocal entered the litigation to protect their interests. They do not believe that the State has the right to transfer their leases to the Trust and that the Settlement Agreement is illegal. Despite the objections of the State, the court has allowed the oil companies to intervene and the litigation over their claims is just beginning. Other affected parties such as Municipal governments and coal producers have also considered intervention.

In the meantime, the ***injunction and lis pendens[2] on the original one million acres*** of Trust land remains. In addition, ***title to the 6.7 million acres of hypothecated***

2 A lis pendens is a notice filed in the record of title that a claim has been made against the land

lands is clouded by the prospect that foreclosure may occur anytime after 1994. Further, under the terms of the Settlement Agreement the ***plaintiffs have already selected 550,000 acres of other State land*** for possible exchange. This land must be segregated and closed to mineral entry or disposal. Finally, since these ***additional selections can continue to be made from any State land, virtually the entire inventory of State land outside of Legislatively Designated Areas is subject to being brought into the litigation*** at any time.

EFFECTS ON DEVELOPMENT

This cloud on millions of acres of State land will remain for years to come while lawsuits over Chapter 66 continue. This has created an international perception that Alaskan land and natural resources are off limits to development. This perception is widely held in both the natural resource investment community and international markets for Alaskan resources and is fostered by Alaska's competitors.

This perception of a land "freeze" is not limited to specific projects, resources, or problems like Wishbone Hill, expansion of the Girdwood ski resort or the consequences of higher utility rates in Southeast Alaska. The length of and uncertain results from the lawsuits, together with the potential for more land to be selected and therefore tied up at any time, combine to create a global stigma about development in Alaska at a time when we can least afford it.

Both the State and the Settling Plaintiffs justifiably claim that they are willing to work with affected parties on specific problems. However, the belief in this freeze will continue because of the possibility, even probability, that any valuable mineral deposit, transportation or pipeline corridor, or strategic surface estate will be tied up in this dispute.

FAILED ATTEMPT TO RELEASE THE "MOMS & POPS"

When the State realized how long the litigation over Chapter 66 would take and the hardship that would be suffered by innocent third parties, it realized the need to ask the Superior Court for "relief" for the over 3,000 so-called Moms and Pops. The State's plan, agreed to by the Settling Plaintiffs, would have modified the injunction and removed the cloud in the record of title. The Settling Plaintiffs could agree to this only with the condition that if Chapter 66 was not approved, *the Trust would be able to reassert its claims to the land.* The court rejected this "relief" last month stating that it could be considered nothing more than a "cruel hoax visited on the third parties" because at this point in time "the likelihood of final approval [of Chapter 66] is speculative, at best".

THE "UNHOLY ALLIANCE"

By early 1992, a number of diverse interest groups normally at odds found that they were united in their opposition to pursuing the land exchange portion of the proposed settlement. The Resource Development Council, Alaska Center for the Environment, Alaska Miners Association, Susitna Valley Association, Sierra Club Legal Defense Fund, Alaska Coal Association, Non-settling plaintiffs and now Marathon and Unocal realized that an amendment to Chapter 66 is needed. These groups all agree that the settlement must be within the State's ability to pay and offer fair compensation to the Trust.

1993 - AMENDMENTS TO CHAPTER 66 SENATE BILL 67

Last session, the members of this unusual coalition united behind an amendment to Chapter 66 which could finally settle the Mental Health Lands Trust litigation. Reintroduced this session by the Senate Resources Committee, Senate Bill 67 would:

1) Retain the portion of Chapter 66 that creates the Mental Health Trust Authority as the Trustee while maintaining the Legislature's ability to appropriate Trust funds.

2) Retain the portion of Chapter 66 which returns as much of the original Trust land as possible to the Trust.

3) Eliminate the land exchange which has led to the litigation over Chapter 66.

4) Instead of the land exchange, continue the current allocation of 6% of the State's unrestricted General Fund Revenue to the Trust income account in place since 1990.

5) Hypothecate (pledge as security) only those original Trust lands that are now in Legislatively Designated Areas (370,000 acres) to insure that the 6% allocation is made. This would free up the 6.7 million acres currently pledged as security.

WHERE DO WE GO FROM HERE?

There is unprecedented and widespread support for amending Chapter 66. Development and environmental interests, local governments, the majority of the Beneficiaries, the thousands of third party hostages, Chambers of Commerce, and many legislators realize the necessity of amending Chapter 66 now.

Unfortunately, the current administration has refused to consider any amendments to Chapter 66. Unless Alaskans become informed and communicate directly with the Governor and their legislators, we face years of litigation while development is discouraged on millions of acres of land. Alaska cannot afford such a divisive, expensive, and lengthy attempt at a settlement.

SENATE COMMITTEE REPORT

DATE: 3/5/93 FURTHER:

DATE TURNED INTO OFFICE: 4·2·93

JUDICIARY Committee considered SENATE BILL NO. 76

"An Act preventing persons with felony convictions from being involved in charitable gaming activities as a permittee, licensee, or employee in a managerial or supervisory capacity; and relating to 'political uses' and 'political organizations' as those terms are used in the charitable gaming statutes."

and recommends:

[ ] replace with _____ CS SB 67 (JUD)

or [ ] adopt previous _____ CS _____ (_____)

[ ] attaches amendment(s)

[ ] same title
[ ] new title
[ ] technical title change (HB only)

[ ] adopts _____ Letter of Intent

[ ] further referral to the Finance Committee

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal
DCED	4·2·93		✓

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal

[ ] Appropriation No Fiscal Note

DO PASS: Rick Halford

OTHER RECOMMENDATIONS:

Need to see final CS
Dave Donley CS adopted only cond: MUST HAVE FINANCE HEAR
Suzanne Little Do Not Pass

Robin L. Taylor Do Pass

Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB 67 (JUD)

Revision Date: April 1, 1993
Title: "...amending...Ch. 66, SLA 1991, that relate to the mental health trust..."
Sponsor: Senate Judiciary Committee
Requestor: Senate Judiciary Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Mental Health Lands

COMPONENT SERIAL NO. 1421

EXPENDITURES/REVENUES:

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

Estimate of current year (FY93) impact:

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: April 1, 1993

Richard I. Pegues /FOR/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: April 1, 1993

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Rev 11/92

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB67(JUD)

Revision Date 31-Mar-93 | Department Affected: Natural Resources

Title: "Mental Health Trust Alternative Settlement Project" | BRU: Resource Development

Components: Land Development

Sponsor: Senate Finance Committee

Requestor: Senate Judiciary Committee | Component Serial No. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	816.4	599.4	238.3	153.3	153.3	153.3
TRAVEL	1.5	1.5	0.5	0.5	0.5	0.5
CONTRACTUAL	190.0	325.0	0.5	0.5	0.5	0.5
SUPPLIES	16.5	10.5	0.1	0.1	0.1	0.1
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1,024.4	936.4	239.4	154.4	154.4	154.4
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE fund source:	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA	1,024.4	936.4	239.4	154.4	154.4	154.4
Other						
TOTAL	1,024.4	936.4	239.4	154.4	154.4	154.4

POSITIONS:

FULL-TIME	13	10	4	2	2	2
PART-TIME	2	1	1	1	1	1
TEMPORARY	1	1	0	0	0	0

Estimate of current year (FY93) Impact: $ _____

ANALYSIS: (Attach a separate page if necessary)

This funding analysis is based upon the duties imposed upon the Department for Mental Health Trust reconstitution and Trust Land Management specified in the CS for SB67(JUD).

Prepared by: Ron Swanson, Director | Phone : 762-2692

Division: Land Development | Date : 31-Mar-93

Approved by Commissioner: Glenn A. Olds | Date: 31-Mar-93

Agency: Department of Natural Resources

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MEMORANDUM

Department of Natural Resources

State of Alaska

Division of Land

TO: Ron Swanson, Director

DATE: March 30, 1993

TELEPHONE NO.: 762-2239

FROM: Bruce Phelps, Project Manager
Mental Health Settlement Unit

SUBJECT: Explanation of FY 94 Budget:
CS FOR SB 67 (JUD)

This memorandum describes the activities associated with the funding provided in the Attachment. The level of effort reflects the trust reconstitution process and land management responsibilities specified under the CS for SB 67 (JUD).

DIVISION OF LAND

7100 Personnel Services

The Division of land will perform extensive title, appraisal, mapping, and land management functions to carry out the requirements of this legislation. Under title activities, it will be necessary to segregate Original Mental Health Trust land (OMHTL) into the conveyable and non-conveyable categories established by the legislation. OMHTL parcels that are identified as non-conveyable must be mapped and included within the Mental Health Sub-system of the Land Administrative System.[1] Conveyable OMHTL must be identified, the terms and conditions of conveyance must be described, and these terms and conditions included within either patent or interim conveyance documents. The results of title research will then be re-written to correspond to the actual language used in Departmental conveyance documents. The results of this effort must be uploaded to the Land Administration System in order to annotate the textual and graphic record. In addition, it will be necessary to undertake limited survey work, and to identify the presence of hazardous substances on conveyable OMHTL. Although the CS for SB 67 eliminates the vast amount of survey work previously required under SB 67, some limited surveying will probably be necessary to establish a datum point. The Department will also actively manage OMHTL, and a new Department Order must be prepared. The requirement to manage conveyable OMHTL will continue in future years, although the need to manage non-conveyable should cease once the latter has been properly identified.

---

[1] Although many aspects of the work involved in the Trust reconstitution process conducted under Chapter 66, SLA 1991, can be used, it will still be necessary to re-evaluate the results of this effort against the requirments of any new legislation that may be adopted.

BP/m0330-rs

7300 Contractual Services

Contractual services will be required for two activities: the inventory of hazardous substances and some limited cadastral survey of certain conveyable OMHTL. The former will identify the presence of such substances, for inclusion in the title conveyance documents.

LAND RECORD INFORMATION SECTION

7100 Personnel Services

The Land Records Information Section (LRIS) will provide computer support extracting and reporting on information contained in the state's Land Administration System, and modifying existing computer systems to properly account for revenues. LRIS will provide geographic mapping at various scales and complexity as required by the project. LRIS will also be responsible for noting the final disposition of all affected lands to the graphic record, and will annotate the textual record on LAS for Legislatively Designated Areas held by the state as collateral.

PROJECT COSTS: MENTAL HEALTH TRUST RECONSTITUTION
SB 67[1]

DIVISION OF LAND

7100 Personnel Services	FY 94	FY 95
Mental Health Project Team		
(1) Project Manager	86.3	86.3
(1) Land Manager	59.3	59.3
(2) NRO II	130.0	130.0
(2) NRO I	109.4	109.4
(1) CT III	39.9	39.9
(1) DPC II	41.5	41.5
(1) College Intern	13.5	13.5
	479.9	479.9
Land & Resource Management		
(1) Cadastral Surveyor III (3 mo.)	29.5	29.5
(1) Cartographer II (3 mo.)	12.0	
Subtotal	521.4	509.4
7200 Travel		
Mental Health Project Team	1.5	1.5
Subtotal	1.5	1.5
7300 Contractual Services		
Mental Health Project Team		
Hazardous Substance Inventory	125.0	75.0
Land & Resources		
Cadastral Survey	50.0	250.0
Subtotal	175.0	325.0
7400 Supplies		

[1] Based on CS for SB67 (JUD) and HB 201 Resources.

Mental Health Project Team	5.0	5.0
Land & Resources	1.5	1.5
Subtotal	6.5	6.5
TOTAL	704.4	842.4

	94	95
Personnel-Full time	8	8
Part time	2	1
Temporary	1	1

LAND RECORD INFORMATION SECTION

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

	94	95
Personnel-Full time	5	2

TOTAL PROJECT COSTS

	FY 94	FY 95
Personnel Services		
Division of Land	521.4	509.4
LRIS	295.0	90.0
Subtotal	816.4	599.4
Travel		
Division of Land	1.5	1.5
LRIS	0	0
Subtotal	1.5	1.5
Contractural Services		
Division of Land	175.0	325.0
LRIS	15.0	0
Subtotal	190.0	325.0
Supplies		
Division of Land	6.5	6.5
LRIS	10.0	4.0
Subtotal	16.5	10.5
TOTAL	1024.4	936.4

	FY 94			FY 95		
	Land	LRIS	Total	Land	LRIS	Total
Positions						
Full time	8	5	13	8	2	10
Part time	2		2	1		1
Temp.	1		1	1		1

OUT-YEAR COSTS

	FY 96	FY 97	FY 98	FY 99
Personnel Services				
Division of Land				
Land Manager (2)	133.3[1]	133.3[1]	133.3[1]	133.3[1]
CT III (6 mo.)	20.0[1]	20.0[1]	20.0[1]	20.0[1]
LRIS				
NRO I	50.0			
DPC I	35.0	____	____	____
Subtotal	238.3	153.3	153.3	153.3
Travel[1]				
Division of Land	0.5	0.5	0.5	0.5
Contractural Services[1]				
Division of Land	0.5	0.5	0.5	0.5
Supplies[1]				
Division of Land	0.1	0.1	0.1	0.1
TOTAL	239.4	154.4	154.4	154.4

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB 67 (JUD)

Revision Date: April 1, 1993
Title: "...amending...Ch. 66, SLA 1991, that relate to the mental health trust..."
Sponsor: House Resources Committee
Requestor: House Resources Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Mental Health Lands

COMPONENT SERIAL NO. 1421

EXPENDITURES/REVENUES:

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

Estimate of current year (FY93) impact:

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: April 1, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: April 1, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB 67 (JUD)

ANALYSIS CONTINUATION:

Although the Senate Judiciary Committee substitute for SB 67 may help resolve some of the potential constitutional issues raised in our fiscal note analysis of February 2, 1993, it is still likely that there will be substantial challenges to the bill from both without and within the mental health community. For this reason, we cannot predict either a savings or an increase in costs in the Department of Law's current level of effort involving the mental trust and mental health trust lands.

.NATE COMMITTEE REPO..T

DATE: 2/8/93 FURTHER: FINANCE

DATE TURNED INTO OFFICE: _____

JUDICIARY Committee considered SENATE BILL NO. 67

"An Act amending provisions of ch. 66, SLA 1991, that relate to reconstitution of the corpus of the mental health trust, the management of trust assets, and to the manner of enforcement of the obligation to compensate the trust; and providing for an effective date."

and recommends: 8-LS0409/K

[X] replace with _____ CS SB67 (JUD) [ ] same title [X] new title

or [ ] adopt previous_____ CS _____ ( ) [ ] technical title change (HB only)

[ ] attaches amendment(s)

[ ] adopts _____ Letter of Intent

[ ] further referral to the _____

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal
LAW	4-1-93	✓	
DNR	03-31-93		1024.4

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal
DNR	2/2/93		1441.7
LAW	2/2/93	✓	

[ ] Appropnation No Fiscal Note

DO PASS: Suzanne R. Cittle, [illegible]

OTHER RECOMMENDATIONS:

[illegible]

[illegible]

Rick Halford

Robin L. Taylor NO Rec

Chair: Signature and Recommendation

PRINCIPLES OF ALTERNATIVE SETTLEMENT

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

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

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

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

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

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

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

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

/ / / / / /

/ / / / / /

/ / / / / /

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

We agree with these principles:

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

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

SB
69

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 69

Revision Date:
Department Affected: Administration
Title: "An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."
BRU: Personnel/OEEO
Component: Personnel/OEEO
Sponsor: Senators Taylor, Duncan
Requestor: Sen. L&C
COMPONENT SERIAL NO. 56

EXPENDITURES/REVENUES:

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

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: R. H. King, Director
Phone: 465-4430
Division: Personnel/OEEO
Date:

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/29/93

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FISCAL NOTES

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO : SB 69

Revision Date:
Title: "An Act prohibiting employers from discriminating against individuals ..."
Sponsor: Senators Taylor, et.al.
Requestor: Senate Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour
COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald Study, CSP, Director Phone : 465-6003
Division: Labor Standards & Safety Date : 2/1/93

Approved by Commissioner: Charles W. Mahlen
Agency: Department of Labor Date: 2/1/93

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February 1, 1993

The Honorable Tim Kelly
Chair, Labor & Commerce Committee
Alaska State Senate
State Capitol, Room 101
Juneau, AK 99801-1182

Dear Senator Kelly:

On behalf of the Alaska Civil Liberties Union (AkCLU), an affiliate of the American Civil Liberties Union (ACLU), I am writing to urge you to support SB 69. This bill is designed to prohibit employers from discriminating against employees based on their use of lawful products during non-working hours and away from the employer's premises. This is a civil liberties and privacy issue of vital concern to the AkCLU and one which the ACLU has strongly supported nationwide.

Employers have the right and the responsibility to be concerned about every employee's job performance, and to take action if that performance is not up to company standards. But an employee's private life is none of his or her employer's business unless it affects their performance.

Unfortunately, many employers today have forgotten this basic rule. These companies refuse to hire people because they smoke or drink at home, because they are overweight, or because they scuba dive or ride motorcycles on their days off. Some of these employers even fire employees who were hired before the policies were adopted.

While a few companies are doing this for paternalistic reasons, most are doing it in an effort to reduce their health care costs. This

A.C.L.U. LETTER OF SUPPORT & LEGISLATIVE BRIEFING

is unquestionably a legitimate corporate goal. But consider the implications of a rule that permits employers to regulate private behavior unrelated to job performance simply because it affects the employee's health. Virtually everything we do affects our health. The list of private choices that may increase health care costs is almost endless: alcohol, tobacco, red meat, fried food, coffee, not getting enough sleep or exercise, even lying on the beach on vacation creates a risk of skin cancer.

The decision with the greatest impact on our employer's health care costs is the decision to have children. If health alone is adequate reason for a company to control private behavior, virtually every aspect of our private lives will be subject to our employer's control.

Even if such interference represented a solution to our nation's health care problems, the civil liberties costs would be too high. But it does not. While the amount of money employers would save by forcing us all to give up our bad habits is unclear, even those who support such corporate programs admit that these habits are not at the core of the problem of increasing health care costs.

We are also concerned about the techniques which employers will be forced to use to enforce such policies. Will all employees be required to submit urine samples for analysis? Will Pinkertons be hired to watch employees while they are away from work? Will employees be encouraged to turn each other in?

As Americans, proud of our heritage of individualism, we cannot accept employers getting into the business of policing private conduct.

We also appreciate the concerns of the health organizations. The government should not be in the business of encouraging people to hurt themselves. Government has the right, and the obligation, to educate its citizens about the dangers of tobacco and alcohol, and to help those who want to quit. But permitting employers to use the power of the paycheck to coerce those who do not want to quit is wrong.

Twenty-three states have already acted to protect their citizens' private lives from employer control. The large majority of these statutes are tobacco specific. This limitation is most unfortunate. While off-duty smokers are among the many groups entitled to protection, what is needed are laws that protect everyone's right to conduct their private life free from employer interference. By passing SB 69, Alaska will be setting an example for the rest of the nation.

If you or your staff would like to discuss this issue in more detail, please feel free to contact our office in Anchorage. In addition, the ACLU has a "National Task Force on Civil Liberties in the Workplace," located in New York City. You may contact the task force director, Lewis L. Maltby, at 212-944-9800 (ext. 402).

Respectfully yours,

Randall Burns

Randall P. Burns
Executive Director

Attachment

sb69pp-2193

LEGISLATIVE BRIEFING SERIES

LIFESTYLE DISCRIMINATION

INTRODUCTION TO LIFESTYLE DISCRIMINATION IN THE WORKPLACE

In 1989, Daniel Winn, an employee at the Best Lock Corporation in Indiana, admitted to his superiors that several years earlier he had a few drinks in a bar with friends. Mr. Winn was promptly fired on the basis of Best Lock's policy that its employees cannot drink alcohol under any circumstances.

Two officials at the Ford Meter Box Co. in Wabash, Ind. pulled Janice Bone aside and escorted her from the plant. Bone is a smoker, and although she did not smoke on the job, Ford's policy barred her from smoking at all. "I was very shocked. It's devastating when this happens to you", said Bone. [1]

In Michigan, Donna O'Leary, a bus driver, was unable during a physical exam to run in place for three minutes. O'Leary, who weighs over 368 pounds was simply terminated after 26 years employment. [2]

Americans have long accepted that employers have a certain degree of control over what we do while at the workplace. But increasing numbers of employers are dangerously broadening the sphere of their control to include what employees do in their own homes. Many employers now refuse to hire people whose private lives are deemed "unhealthy". A few even fire current employees who don't change their lifestyle to meet new company demands. The most common victims of this type of discrimination are smokers and fat people. [3] According to a 1988 survey taken by the Administrative Management Society, 6% of all employers (about 6,000 companies) now discriminate against off-duty smokers. The number has almost certainly increased since then. It is more difficult to estimate the number of companies which discriminate against fat people, since this is seldom an official corporate policy. However, anecdotal evidence collected by the National Association for Advancement of Fat Acceptance (NAAFA) suggests that discrimination against fat people is even more common. Other employers refuse to hire people who drink alcohol, have high cholesterol levels, or ride motorcycles.

The driving force behind this trend is economics. Health care costs for employers are increasing by at least 15% per year, [4] almost 3 times as fast as inflation. Although several factors contribute to these rising costs, the only factor employers have control over is their employees. With such an incentive, employers may well try to dominate every

[1] Article about becoming employees' business "Philadelphia Inquirer, March 31, 1991.
[2] Schlueter, John, *Employment Discrimination Based on Employee Lifestyle*, A.C.L.U. Document Bank #P13 (1991)
[3] This is the cases for people have chosen to describe themselves.
[4] Rundle, *A New Look at Welfare Fraud: Well-Designed Programs Yield Fat from Health Care Tab*, Bus. Ins. February 18, 1991

health-related aspect of their employees' lives, including diet, exercise and sleep habits — and without protective legislation they will succeed.

The early Americans adopted the Bill of Rights to limit the government's involvement in their lives and modern Americans demonstrate the same unwillingness to tolerate intrusion whether by government or by employer. According to a 1990 poll by the National Consumers League, [5] 81% of Americans believe that an employer has no right to refuse to hire an overweight person. 76% believe employers have no right to refuse to hire a smoker. 73% believe employers have no right to require an employee or applicant to change their diet.

Recognizing that refusing to hire people for reasons unrelated to job performance is unfair and often prevents the company from hiring the best qualified person, some employers have adopted a different strategy. Employees who have lifestyles the employer considers unhealthy are required to pay more for their company health insurance. Some employers say they are charging unhealthy employees a premium over their "normal" rate, some say they are giving healthy employees a discount. Either way, one employee is paying more for their health care than another.

This may not be wrong in principle, but such programs should be based on sound actuarial data. The company should be able to demonstrate that the behavior in question increases employer health care costs by a measurable amount. While such relationships may exist, the data currently available does not demonstrate it clearly. For example, the Bureau of National Affairs reports that 95% of companies banning smoking reported no financial savings, [6] and the U.S. Chamber of Commerce has found no connection between smoking and absenteeism.

The methods used to enforce these policies raise independent civil liberties issues. Most employers currently take an employee's word that they are not violating the rules for off-duty behavior. As discrimination grows more common, however, it will become more difficult to simply avoid companies with whose policies one doesn't comply. People will take jobs, not reveal their lifestyle, and hope the employer doesn't find out. When this occurs, employers will have to hire spies to follow people away from work and/or require frequent universal medical testing (such as urinalysis) in order to enforce the policy.

[5] See A.C.L.U. Document Bank #P4.
[6] Bureau of National Affairs, *When There's Smoke: Problems, Policies Concerning Smoking in the Workplace*, 2nd ed. 1987

QUESTIONS AND ANSWERS: LIFESTYLE DISCRIMINATION

WHICH COMPANIES PRACTICE LIFESTYLE DISCRIMINATION?

There is no comprehensive list of companies which practice lifestyle discrimination. A few examples of employers who discriminate include:

- Cardinal Industries refuses to hire smokers stating it "only hires non-smokers and gives every applicant a urine test and promises to fire those who say they have quit, but don't."
- U-Haul International charges its smoking employees an extra $130 per year for health insurance.
- Pointe Resorts, which operates 3 hotels in Phoenix, pays 40% more of the insurance costs of employees with a normal weight than of those who are overweight.
- In 1990, the city government of Athens, Georgia initiated a health screening for prospective city workers. Applicants whose cholesterol level was in the worst 25% of national ranges were simply ineligible for any position.

SHOULDN'T EMPLOYERS BE ABLE TO KEEP THEIR COSTS DOWN BY HIRING EMPLOYEES WHO WON'T GENERATE HIGH MEDICAL BILLS?

It is unfair and dangerous to allow employers to discriminate against certain employees because they believe their private lifestyle choices are unhealthy and lead to higher health insurance costs. To begin with, it is unclear that employers can achieve significant savings through lifestyle discrimination. Also, if it becomes acceptable to deny employment because of potentially higher health care costs, people who are capable of working will be effectively banned from any employment, preventing them from providing for themselves or their dependents. Finally, even if employers could achieve substantial savings, sacrificing the private lives of all working Americans is too high a price to pay.

WHY SHOULDN'T EMPLOYERS BE ABLE TO RESTRICT THEIR EMPLOYEES' HIGH-RISK BEHAVIOR?

Risks are associated with nearly every personal lifestyle choice we make — from smoking cigarettes, to sitting in the sun, to having children. Where do we draw the line as to what our employer can regulate? The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives.

ISN'T IT WRONG TO ENCOURAGE PEOPLE TO SMOKE WITH PROTECTIVE LEGISLATION?

The government has the obligation to insure that people understand the health risks of smoking. Government and employers ought to help people who want to quit smoking. Ultimately, however, it is up to the individual to decide if they want to engage in risky behavior such as smoking or riding a motorcycle. What is wrong is using the power of the government or the paycheck to tell other people how to live.

ISN'T THIS CREATING A RIGHT TO SMOKE?

No. The A.C.L.U. does not oppose smoking bans in public buildings, in the work-place, or in other locations where non-smokers may be subjected to sidestream smoke. We object only to bans on smoking (or beer or junk food) in a person's own home.

ISN'T LIFESTYLE DISCRIMINATION LEGISLATION JUST A TOOL OF TOBACCO COMPANIES?

No. Lifestyle discrimination legislation is supported by a variety of civil rights and labor organizations and by the majority of Americans.

CURRENT LEGAL STATUS OF LIFESTYLE DISCRIMINATION

Federal Law

At the federal level, civil rights laws barring discrimination on the basis of race, gender or disability may apply to lifestyle discrimination.

Race and Gender

There is demographic data showing that blacks and young women smoke in disproportionately large numbers. It is possible that this disproportion is large enough to constitute disparate impact under Title VII of The Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of race and gender.

Disability

The new Americans with Disabilities Act (ADA) prohibits employment discrimination against people with "any physical or mental impairment that substantially limits one or more of an individual's major life activities" and also people who are "regarded as having such an impairment."

While the ADA does not take effect until July of 1992, employees of federal agencies and federal contractors already have this protection under section 504 of the Federal Rehabilitation Act of 1973.

While there is not yet case law on point, it can be argued that certain forms of lifestyle discrimination are illegal under ADA. The critical issue is whether the individual's limitation (real or perceived) is serious enough to qualify as a "disability".

State Law

Most states have statutes parallel to the Federal Rehabilitation Act of 1973, which cover both public and private sector employees. There have already been state court decisions holding that under these statutes fat people are protected from discrimination. For example, the New York Court of Appeals held that Xerox Corp. violated the New York Human Rights Law by denying Catherine McDermott a job because of her obesity. The Court rejected the company's claim that it had a right to deny employment because of the likely future health costs her condition would create for the company. The Court said that "employment may not be denied because of any actual or perceived undesirable effect the person's employment may have on disability or life insurance programs." [7]

Even the best state disability laws, however, provide no protection for lifestyle choices that are recreational rather than medical.

To correct the shortcomings of current law, twenty-one states have passed lifestyle discrimination statutes. The majority of these protect only smokers, but a few are broader. Colorado and North Dakota ban discrimination based on any form of legal off-duty behavior.

[7] Schlosh, Supra, Note 20

A complete list of state lifestyle discrimination statutes:

Enacted Privacy Legislation
1989 - 1991

STATE	LANGUAGE	BILL NUMBER	ENACTED
Virginia	Smokers Only	S607	March 27, 1989
Oregon	Smokers Only	S986	July 28, 1989
Tennessee	Smokers Only	H2516	March 29, 1990
Kentucky	Smokers Only	H628	April 9, 1990
Colorado	Legal Activities	H1123	April 17, 1990
S. Carolina	Smokers Only	S981	June 25, 1990
Rhode Island	Smokers Only	H8768	July 12, 1990
S. Dakota	Smokers Only	SB102	March 1, 1991
New Mexico	Smokers Only	S132	April 4, 1991
North Dakota	Legal Activities	SB2498	April 5, 1991
Mississippi	Smokers Only	SB2172	April 16, 1991
Indiana	Smokers Only	H1439	May 4, 1991
Oklahoma	Smokers Only	HB1590	May 8, 1991
New Hampshire	Smokers Only	S171	June 10, 1991
Nevada	Legal Products	AB667	June 14, 1991
Maine	Smokers Only	LD1696	June 18, 1991
Connecticut	Smokers Only	H7211	June 25, 1991
Arizona	Smokers Only	SB1153	June 25, 1991
New Jersey	Smokers Only	A4699	July 15, 1991
Louisiana	Smokers Only	HB499	July 19, 1991
Illinois	Legal Products	HB1533	January 1,1992

New York & Michigan have pending legislation.

Government Employees

Government employees are protected by equal protection and due process clauses of the federal constitution.

There are comparable clauses in many state constitutions.

These constitutional provisions should protect public employees from discrimination based on non-job related criteria. Perhaps for this reason, lifestyle discrimination by public employers is rare.

The city of North Miami, however, recently adopted an ordinance barring smokers from any municipal employment. The Florida A.C.L.U. has challenged this policy in court, [8] and the result will shed much light upon the extent to which public employees are already protected.

[8] Kratz v. City of North Miami, Florida Bar No. 4440006 (filed January 1991)

MODEL ACT

1.Prohibited Practices

1.1 It shall be illegal for an employer to discriminate against any employee or applicant on the basis of that person's conduct during non-working hours away from the employer's premises or on the basis of personal characteristics unless that conduct or characteristic affects the person's ability to properly fulfill the responsibilities of the position in question.

1.2 No employer shall collect information about the off-duty behavior or personal characteristics of employees or applicants which would not be a legitimate basis for personnel decisions under section 1.1.

2.Exceptions

2.1 Nothing in sections 1.1 and 1.2 shall be construed to make it illegal for an employer to:

2.2 Maintain a bona fide conflict of interest policy. This section applies only to current employees and does not affect the law of this state regarding restrictive covenants for former employees.

2.3 Refuse to employ a person whose off-duty conduct, while not incompatible with the requirements of the position, is incompatible with the fundamental objectives of the organization.

3.Enforcement

3.1 Any person who has been aggrieved by a violation of this act shall have a private right of civil action in any court of competent jurisdiction in this state.

3.2 In any such civil action the plaintiff shall have the burden of proving that he or she was qualified for the position in question. The defendant shall then have the burden of producing a basis for its decision which is consistent with this statute. The plaintiff then has the burden of proving by a preponderance of the evidence that the actual reason for the decision was off-duty behavior or a personal characteristic. The defendant then has the burden of proving that this behavior or characteristic is job related.

4.Remedies

4.1 A prevailing plaintiff in a civil action under this action is entitled to:

4.2 Injunctive relief.

4.3 An award of damages equal to the harm caused by the violation (both economic and non-economic) or $1,000, whichever is greater.

4.4 Full costs of action plus reasonable attorney's fees.

5.Waiver

5.1 The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

COMMENTS ON DRAFTING A LIFESTYLE DISCRIMINATION STATUTE

The crucial choice in drafting a statute is deciding how broad the protection should be. There are four basic alternatives:

1. Prohibit Discrimination Based on Off-Duty Smoking

This is the most limited form of protection. While it protects one of the largest groups of victims, it leaves many unprotected. It also lends credence to the charge that the legislation is about smoking rather than autonomy and privacy. Its only real benefit is that its impact is limited and clearly defined. This can reduce, or even eliminate, opposition from organized business.

2. Prohibit Discrimination Based on Off-Duty Use of All Legal Substances

This formulation expands the coverage to off-duty drinking and, possibly, people with high cholesterol or other conditions related to diet.

3. Prohibit Discrimination Based on Any Legal Off-Duty Behavior

This is the broadest coverage that has yet been obtained. It clearly protects all dietary lifestyle choices and also choices of hobbies (skiing, motorcycles, etc.). It also prohibits discrimination based on sexual orientation in the 25 states that have repealed their sodomy laws.

The pragmatic problem with this approach is that it is so sweeping that its exact impact is hard to determine in advance. This uncertainty increases opposition from organized business. While we have addressed all the legitimate concerns they have raised (see "exceptions"), there is concern that not all the legitimate concerns have yet been identified.

4. Prohibit Discrimination Based on Anything Not Related to Job Performance

This is the ideal way to write the statute. It not only prevents discrimination based on off-duty conduct, but prevents discrimination based on personal characteristics unrelated to job performance. All fat people are clearly protected under this approach. So are short people, the physically unattractive, and others who are often discriminated against, but whose condition is not serious enough to be classified as a "disability".

The second question is the position you want to take on illegal off-duty behavior.

The ideal position is that the employer's legitimate interest is limited to behavior that is related to job performance, and that even illegal off-duty behavior that does not affect a person's fitness for duty should not be grounds for discrimination.

This position is probably politically untenable at the present time, especially where illegal drugs are involved. We may have to limit our bills to legal off-duty behavior, even in our initial proposal.

Assuming you choose general coverage option 3 or 4 above, there are a series of proposed exceptions from the business community to consider. Each of these purports to

be a situation where a certain form of off-duty behavior is legal, but the employer has a legitimate reason for prohibiting it. These include:

1. Conflict of Interest: This is straightforward, and we have included it in the model.

2. Anti-nepotism Policies: Having relatives working together can create conflict. Many companies, however, have found ways to manage this without discriminating against relatives of employees. This is a judgment call. Our model does not include this exception.

3. Conduct Incompatible with Organizational Goals: The American Lung Association believes it should have the right to refuse to hire smokers. The model incorporates language which would allow this practice. It can be argued that this exception should be limited to high level employees.

4. Surcharges: Even when they support legislation banning lifestyle discrimination in hiring, organized business will lobby vigorously for the right to charge "unhealthy" employees more for company health insurance. (See introduction).

There is no compelling civil liberties argument against this in principle. It is not, however, a practice we want to encourage, and is not included in our model.
The best position may be to remain neutral in principle, but insist on two conditions if a surcharge authorization is included in legislation:

1. Any difference in employee contributions must be supported by sound actuarial data on employer costs.

2. No surcharge may have a disparate impact on a group which is protected from job discrimination under federal or state law.

LOBBYING STRATEGIES

The political landscape is much different for lifestyle discrimination legislation than for other workplace rights bills.

We do not have strong opposition from organized business. The U.S. Chamber of Commerce has taken the position that it is wrong for an employer to refuse to hire (or fire) someone because of off-duty conduct unrelated to job performance. At least one state chamber (New Jersey) has actually supported lifestyle discrimination legislation.

In most states, disagreements over statutory drafting (especially damages) and a general reluctance to support legislation that restricts business led the chamber to remain neutral or offer lukewarm opposition. Seldom, however, have we encountered the strident opposition that has frustrated our efforts on other issues.

The real opposition comes from anti-smoking groups. This includes both national groups like th American Lung Association and local voluntary organizations. Although they are loath to admit it, these people are prohibitionists. They believe that smoking is so harmful that it should not be a matter of personal choice but should be stamped out by any available means. They are not very articulate or candid, but they have a great asset in public antipathy toward smoking, and they know how to play to it.

Critical to this issue, as usual, is organized labor. The AFL-CIO and the Communications Workers of America (CWA) have generally supported lifestyle legislation. We have also had support from police and firefighters unions (those most likely to be victims). Another likely ally is the Carpenters and Joiners union. Their President, Sigurd Lucassen, has been labor's spokesman against outright bans on workplace smoking.

This is a relatively new issue, however, and one cannot assume that all labor leaders are familiar with it or will automatically make it a priority. As with any emerging issue, support for lifestyle discrimination laws must be developed.

Other progressive groups, including religious organizations, should support this legislation, but have generally not yet been asked.

PRESENTING THE ISSUE

It is always true that the way an issue is framed influences, and often determines, the response. That is especially true here. Opponents will claim that the issue is smoking, even if the bill covers all legal off-duty behavior. The public's tendency to think in the concrete rather than the abstract, the fact that smokers are among the most common victims, and the fact that tobacco companies support the legislation, all work in our opponents' favor. If they succeed in casting the issue this way, we will surely lose.

The real issue here is privacy—the right of all adults to live as they choose in their own homes. The public strongly supports this value. They are not inclined to view the issue this way, and you will have to repeat our position ad nauseum. But experience has shown that with enough repetition, the public will understand the real issue. Once this happens, we will be successful.

Do's and Dont's

Labor Law- not Civil Rights

Some states have attempted to create lifestyle legislation by amending their state civil rights act. This lends credence to the charge that we are trying to turn smoking (or drinking) into a civil right. It also offends some people in the civil rights community.

It is vastly better to place this protection in the state labor law. It is also more correct; the law's purpose is to modify the legal relationship of employers and employees.

Health Economics

There is in fact a great deal of uncertainty over the health care cost implication of various lifestyle choices. Even where a given behavior clearly causes a measurable increase in health care costs, it is not necessarily true that these costs will be paid by employers.

Health care economics, however, is not the issue. The issue is privacy. Any discussion of economics plays inm the hands of those who would mislead the public by mis-stating the issue.

Spokespeople

Since the issue is not smoking, drinking, or hang gliding, but privacy, the spokespeople for the issue should be those who care about this principle rather than the specific behavior.

SUPPORTING ORGANIZATIONS

Here are some of the organizations which support lifestyle discrimination legislation. The addresses and phone numbers listed are for national offices, but you can use these contacts to reach the appropriate state and local offices.

AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

Communications Workers of America
501 3rd Street, N.W.
Washington, D.C.
(202) 434-1300

Fraternal Order of Police
2100 Gardiner Lane
Louisville, Kentucky 40205
(502) 451-2700

National Association for Advancement of Fat Acceptance (NAAFA)
P.O. Box 188620
Sacramento, California 95818
(916) 443-0303

Philip Morris U.S.A.
120 Park Avenue
New York, N.Y. 10017
(212) 880-4131

Smokers' Rights Alliance
20 East Main Street
Suite 710
Mesa, Arizona 85201
(602) 461-8882

United Brotherhood of Carpenters and Joiners of America
101 Constitution Avenue, NW
Washington, DC 20001
(202) 546-6206

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352 Front Street
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SPONSOR STATEMENT - SB 69

Senate Labor and Commerce Committee
February 2, 1993

First of all, I would like to thank Senator Kelly and the committee for hearing this legislation in such a timely manner.

SB69 is entitled "an Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work". A more accurate title would call it the workers' right to privacy act.

The right to privacy goes to the very heart of the Constitution of the State of Alaska. SB69 would strengthen that Constitutional guarantee by prohibiting employers from refusing to hire, discharge or otherwise discriminate against an individual because that individual uses a lawful product in a lawful manner during non-working hours.

The results of a survey conducted in December of 1991 show Alaskans have a growing concern about employer intrusion into their private lives. Nationally, the New York Times has reported that 6,000 firms refuse to hire smokers and that in some instances individuals have been fired when random drug testing revealed they had used tobacco at home. Some corporations bar employees from using alcohol off the job.

91% of the people surveyed in Alaska said they thought it is inappropriate for employers to deny a job to someone or fire someone based on conduct away from the workplace. At the same time, nearly 20% of those surveyed in Alaska report that an employer has denied a job or fired either them or someone they know for non-job-related activities.

Quoting an editorial from the Anchorage Daily News "In the workplace, only one question should matter: How well do workers do their jobs? As long as what employees do on their own time doesn't affect their job performance, it's none of their employers' business."

SPONSOR STATEMENT

Hyder • Ketchikan • Wrangell

Sponsor Statement - SB69
Senate Labor and Commerce Committee
February 2, 1993

SB69 **does not** impose restrictions on employers from discharging or penalizing an employee for failure to meet job performance standards. It **does not** limit an employers ability to pass on any differential premium rates based on an employees use of legal products and it **does not** apply to the employees of a religious corporation, educational institution, or society who perform work connected with such an entity's activities.

Mr. Chairman, I ask for the support of this committee for Senate Bill 69.

Thank you.