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

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,	)	FILED in the Trial Courts State of Alaska Fourth District Dec 06, 1994
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	
_____	)	

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER GRANTING FINAL APPROVAL TO THE HB 201 SETTLEMENT

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I. INTRODUCTION

This lawsuit is a class action which began twelve years ago. Alaska Civil Procedure Rule 23 contains procedures specifically governing class actions in state courts. It is essentially identical to the corresponding federal rule. See Alaska R. Civ. P. 23. Subsection (e) of Rule 23 safeguards the rights of class members by requiring court approval of any proposed settlement after notice has been given to the class.[1] Alaska R. Civ. P. 23(e). Due process requires that notice to the class members be given because settlement of a class action has res judicata effects on all

[1]Alaska Civil Rule 23(e) states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Alaska R. Civ. P. 23(e).

class members.[2] Grunin v. Intern'l House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864, 46 L.Ed.2d 93 (1975). The requirement of court approval of settlements prevents private agreements which are contrary to the best interests of the class and protects the interests of absent class members who are not among the negotiating parties.[3] In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 758 (E.D.N.Y. 1984).

The approval process for settlement of a class action involves several steps: (1) submission of the proposed settlement to the court; (2) if necessary, an evidentiary hearing about the negotiation process and other concerns about the settlement proposal; (3) preliminary approval by the court and an order regarding notice to the class and the scheduling of a final hearing at which members of the class may comment; (4) notice informing class members of the proposed settlement and solicitation of their comments concerning the settlement; (5) a fairness or final approval hearing regarding whether the settlement is reasonable and fair to the class; (6) final approval of the settlement by the court and either dismissal of the case or continuing court oversight of the implementation of settlement provisions. See generally H. Newberg, Newberg on Class Actions § 11 (3d ed. 1992); Manual for Complex Litigation, Second § 30.4 (1985) ["MCL2d"].

At the preliminary approval stage, the court determines whether the proposed settlement has obvious deficiencies and is sufficiently within the range of possible approval to warrant the time and expense for giving notice to the class. See, e.g.,

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[2]The type of notice required for due process depends upon the nature of the class and the kind of relief involved. This is discussed in relation to this case in part IV of this Memorandum Decision.

[3]The Civil Rule 23(e) requirements for the settlement of class actions are necessary because of the possibility that:

> substantial rights of the class may be bargained away in exchange for relief which inures primarily to the named plaintiffs or to class counsel. Because of the potential for abuse, protection of class interests cannot be left to class counsel alone. The Court must act as the guardian of the class.

Holden v. Burlington Northern Inc., 665 F. Supp. 1398, 1406 (D. Minn. 1987) (citations omitted).

Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). At the final hearing, proponents of the settlement must convince the court that the proposed settlement is "fair, reasonable, and adequate" before final approval may be granted. E.g., Grunin v. International House of Pancakes, 513 F.2d at 123. The class comment portion of the final approval hearing provides an opportunity for class members to present their objections to the settlement. In re Agent Orange, 597 F. Supp. at 759.

The court's role in reviewing a class settlement is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315. A class action settlement remains a bargained bilateral compromise negotiated between the litigants. Id. The court has no authority to delete, modify, or substitute terms of the settlement and can only accept or reject the settlement proposal as it is presented. Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 630 (9th Cir. 1982); MCL 2d § 30.41, at 237.

This proposed settlement is now before the court for decision on whether it should receive final approval. It was submitted by three of the parties in June 1994. The court conducted an evidentiary hearing in July. The court granted preliminary approval on July 29, 1994. The class has received notice. The court has received comments from the class. The court conducted a lengthy hearing on the fairness of the settlement. The opinion that follows explains the process and contains an analysis of the settlement agreement.

II. BACKGROUND

A. History of the Case

The mental health lands trust was created by Congress with passage of the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental health programs from the federal government to the Territory of Alaska and granted a one million acre trust to the Territory to aid in the financial

support of a comprehensive mental health program.[4] Pub. L. No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) of the Enabling Act states:

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

Pub. L. No. 84-830, § 202(e), 70 Stat. 709 (1956). Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust land grant from the Territory to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

The State of Alaska managed trust lands in the same manner as lands granted under section 6(a)-(b) of the Alaska Statehood Act ["general grant lands"] and did not maintain separate

[4]In 1956 no mental health services existed in Alaska. The federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon.

accounting for revenue produced by trust lands.[5] Because the mental health trust lands were some of the first land parcels selected by Alaska, trust lands were among the most attractive state lands for surface value use both for private development and public purposes. During the 1970's there was growing pressure on the Legislature to convey state-owned land to private individuals and municipalities. In 1978, the Alaska Legislature enacted Chapters 182 and 181, SLA 1978, redesignating mental health trust lands as general grant lands to be managed and conveyed as all other state-owned lands. A percentage of all State land revenue was to be paid to a mental health trust fund to compensate the trust for the loss of the lands "subject to legislative appropriation of sufficient funds." Ch. 182 § 4, SLA 1978. No money was ever appropriated by the legislature to the fund.

After the redesignation legislation, some of the original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some of this land to private individuals. Many of the trust lands most suitable for development were sold by the State to private individuals through the land sale programs implemented by the Alaska Department of Natural Resources ["DNR"]. Overall, up to 50,000 acres were conveyed to private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000 acres were placed in legislatively designated areas[6] such as state forests, parks and wildlife areas. Only about 35 percent of the original one million acres of trust land remained unencumbered and in state ownership in 1985.

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[5]Most state-owned lands are the general grant lands conveyed to Alaska under subsections (a) and (b) of section 6 in the Alaska Statehood Act.

[6]In legislation for a previous settlement attempt in this case, the term "legislatively designated area" was defined as land designated by state 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 marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. Ch. 66 §§ 54(6), 55(b), SLA 1991.

Vern Weiss, on behalf of his son Carl Weiss, and Earl Hilliker filed this lawsuit as a proposed class action on November 26, 1982. The complaint stated that Earl Hilliker and Carl Weiss were in need of mental health services unavailable in Alaska. They claimed that the State breached the mental health lands trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the lawsuit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska." Order Certifying Action (Jan. 26, 1983) (Judge Taylor). The superior court ruled that the State breached its duties as trustee by redesignating the trust lands as general grant lands, but also ruled that invalidation of the 1978 redesignation legislation was not an available remedy. The superior court ordered the State to pay the trust an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus prejudgment interest from the date of each conveyance. Additionally, the superior court ordered a setoff for all money spent by the State on mental health services. Both sides appealed from that decision.

In October 1985, the Alaska Supreme Court upheld the superior court's ruling that the State had breached its obligations as trustee for the mental health lands trust established by Congress in 1956. State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). However, the Supreme Court invalidated the 1978 redesignation legislation and held that the trust should be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. Weiss, 706 P.2d at 684. The Supreme Court provided the following "guidance" to the superior court on remand:

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former

> mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of the sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of the land sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

Weiss, 706 P.2d at 684 (footnote omitted). The Court specifically declined to rule on questions raised in amicus briefs regarding the title held by the conveyancees and bona fide purchasers of mental health trust lands. See Weiss, 706 P.2d at 684 n.4.

In 1985, Weiss and Hilliker were the only class representatives. The Alaska Mental Health Association ["AMHA"] was permitted to intervene on January 24, 1986, and Mary C. Nanuwak and John Martin were added in June 1986.[7] The AMHA intervened because of its disagreement with the manner in which the original plaintiffs' attorney was conducting the case.[8] See Transcript of Oral Argument before the Alaska Supreme Court, at 2-4, 7 (Jan. 14, 1986). In particular, the AMHA believed that the validity of many of the State's conveyances of mental health land to third parties, such as municipalities, should be challenged, because the conveyances were the result of the State's breach of trust. Id. at 18, 27-29. The superior court permitted AMHA to file additional claims only to the extent that the claims related directly to the reconstitution of the trust ordered by the

[7]These intervening plaintiffs are represented by James B. Gottstein.

[8]Stephen Cowper was the original plaintiffs' attorney until October 1985. Aff. Cowper (June 2, 1986). William Council replaced Cowper, but withdrew in March 1986. David Walker has been the attorney for Weiss and Hilliker since 1986. See Order Granting Motion for Withdrawal by Attorney and Substitution (filed April 1, 1986).

Alaska Supreme Court in State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). Order (June 19, 1986) (Judge Greene).

On March 31, 1987, the court permitted Bosel, Doulin, Goodwin, and Mayoc ("Bosel") to intervene in order to assure adequate representation for the developmentally disabled who were potential members of the class. Soon after intervening, the attorney for Bosel, Jeff Jessee, requested that mentally retarded and mentally defective individuals be declared to be among the intended beneficiaries of the trust and members of the class. Bosel's Motion for Partial Summary Judgment (July 14, 1987). Mr. Walker and Mr. Gottstein, attorneys for Weiss and AMHA respectively, opposed including as beneficiaries individuals not falling within the traditional definition of "mentally ill."

H.L., M.K., and Alaska Addiction Rehabilitation Services ("H.L."), on behalf of chronic alcoholics with psychoses, were permitted to intervene on June 1, 1987. Order Granting Intervention (June 1, 1987). H.L. sought to intervene "to assure better representation of the class" and to assure that the relief obtained in this action reflects the needs and characteristics of [chronic alcoholics]." H.L.'s Memorandum in Support of Motion to Intervene, at 1, 3 (May 13, 1987).

In 1988 the court ruled that Congress intended the trust to benefit at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded. Memorandum Decision and Order, at 16-17 (April 27, 1988). Included in this definition of trust beneficiaries were chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness. Id. at 17 n.6. The court also concluded that it was within the discretion of the State to include other groups as recipients of services by the mental health program, but it was not within the discretion of the State to exclude the groups specifically identified by the court as intended beneficiaries. Id. at 17. The class definition was modified in 1994 to coincide with this definition of the beneficiaries as a result of this decision. The class is now defined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer from major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition (Aug. 2, 1994).

The Supreme Court's "guidance" in its 1985 decision created almost as many issues as it resolved. The continuing uncertainty surrounding the validity of third party conveyances has been a major source of disagreement among the parties in evaluating the potential outcome of continued litigation. Because the setoff is applicable only to lands "sold," interpretation of the term "sold" within the context of the Supreme Court's decision has been another source of disagreement. It is in the interest of the class to include as few lands as possible within the definition of "sold," while it is in the State's interest to include as many lands as possible.[9] It is also hard to determine which specific state expenditures should be included in the setoff.[10] A simple return of all original trust lands still in state ownership presents problems for both the class and the State due to the impact on state forests, parks, and wildlife refuges, including the Chilkat Bald Eagle Preserve near Haines. These and other unresolved issues led the

[9]As a result, attorneys for the class have argued that the term includes only private third-party purchasers falling within the strictest possible definition of bona fide purchaser. The State, on the other hand, has suggested that any lands where an interest has been given or conveyed to others, including use of the land by another state agency, are "sold."

[10]For example, services specifically for alcoholics have not always been classified as mental health services, although chronic alcoholics suffering from psychosis are among the beneficiaries of the mental health lands trust. Additionally, the State has proposed inclusion of the cost of incarcerating people who are class members and violate the criminal laws.

parties to spend several years pursuing proposals for settlement of this case.

B. Previous Settlement Attempts

Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). Chapter 48 and Chapter 210 were abandoned by the parties before the proposals were even presented to the court. The State withdrew from the Chapter 66 settlement after the court denied preliminary approval.

The Chapter 48 and Chapter 210 settlement proposals both involved the State's continued use of trust lands with the trust to be compensated with "rent." In Chapter 48, the trust was to be reconstituted entirely with land within legislatively designated areas and the original trust lands not within legislatively designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of trust land. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of eight percent of the fair market value of the trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was to constitute the income of the trust. Chapter 48 also created the Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

The parties could not agree on the fair market value of the trust lands. The fair market value was estimated at $2.243 billion using procedures approved by the Interim Mental Health Trust Commission.[11] The State objected to this figure as grossly excessive. The Commissioner of DNR notified interested parties on April 17, 1990, that the State refused to follow the Commission's

[11]The Interim Mental Health Trust Commission was originally established under Chapter 132, SLA 1986.

procedures for determining fair market value. An impasse resulted ending the consideration of the Chapter 48 settlement.

The Legislature then enacted a different proposal in Chapter 210, which eliminated the need for determination of land values. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's annual unrestricted general revenues. Plaintiffs rejected this proposal, in part because they expected the State's general revenues to fall to a level at which the trust was unlikely to receive fair compensation for the value of the trust lands.

The State continued to convey original trust lands while various settlement proposals were negotiated. After the impasse in the Chapter 48 process was reached, plaintiffs obtained a preliminary injunction prohibiting the State from taking any further action on mental health lands. See Memorandum Decision and Order (July 9, 1990). The plaintiffs also refiled lis pendens on all original mental health lands. Between 4,000 and 6,000 land transactions were affected by the injunction and lis pendens. This placed many purchasers of small parcels in the difficult position of making all of their payments to the State for land purchased in state land sales, but being unable to obtain title to the land. Because of the cloud on their title, many of these individual purchasers found themselves unable to sell the land or obtain financing for construction. Original mental health trust lands have been closed to mineral activity since shortly after the Supreme Court's decision.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66.[12] Chapter 66 established a procedure for reconstitution of the mental health lands trust through a process amounting to a land exchange

[12]Chapter 66 contained a provision that it would not become effective until this lawsuit was dismissed. Ch. 66 § 58, SLA 1991. That provision was changed during the special sessions of the 1994 legislature to provide that certain sections of Chapter 66 would become effective December 16, 1994 if the HB 201 settlement was approved and the lawsuit dismissed by December 15, 1994. Ch. 1 § 2-3, SSSLA 1994, amending Ch. 5 §§ 37 & 39, FSSLA 1994; Ch. 5 § 38, FSSLA 1994.

between the State and the trust. It also contained amendments to legislation affecting some of the state's mental health programs and created a new agency, the Alaska Mental Health Trust Authority, to act as trustee. The Chapter 66 settlement was a land-based settlement without any significant cash component. During the negotiations leading to the enactment of Chapter 66, the State refused to consider a settlement with a large cash component. On April 6, 1992, a proposed settlement agreement incorporating Chapter 66 was signed by the State and three of the four attorneys representing the class, Mr. Walker, Mr. Gottstein, and Mr. Jessee.

The legality of portions of Chapter 66 and the 1992 proposed settlement agreement was challenged by intervening outside interests.[13] A group of public interest intervenors ["Public Interest Intervenors"][14] brought a broad-based constitutional attack on the parts of the Chapter 66 settlement which reconstituted the land trust.[15] Marathon Oil Company and Union Oil Company of California challenged portions of the settlement's reconstitution process which could affect their oil and gas leases on state land in Cook Inlet.

The Public Interest Intervenors' challenge attacked the constitutionality of many parts of Chapter 66. The challenge raised state constitutional issues of first impression in Alaska. The issues presented were very complex and briefing and decision substantially delayed consideration of the Chapter 66 settlement. The decision by this court invalidated the hypothecated lands list and held that state land laws were applicable to the trust unless the application of the law violated the Enabling Act. The settling

[13]The court's decisions on April 26 and May 14, 1993, with regard to these challenges have been appealed. The Alaska Supreme Court stayed the appeals when the State withdrew from the Chapter 66 settlement.

[14]The Public Interest Intervenors included the Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited. They were represented by attorneys for the Sierra Club Legal Defense Fund.

[15]The Public Interest Intervenors objected to the provisions for the land-based trust reconstitution contained in sections 54 through 57 of Chapter 66.

parties had the right to withdraw from the agreement because they viewed these matters as crucial to the Chapter 66 settlement. The issues on appeal placed the entire settlement at risk.

The intervening oil companies challenged the legality of transfer of the State's interest as lessor in oil and gas rights on state land in Cook Inlet, as well as confidentiality provisions in the settlement agreement and the agreement on interim management of state lands. Their challenges also delayed the approval process and the issues on appeal threatened the very existence of the settlement.

Mr. Volland, attorney for H.L., opposed approval of the Chapter 66 settlement. Mr. Volland alleged that improprieties occurred during negotiations; an evidentiary hearing regarding negotiations was held in September 1992 and January 1993. Although Mr. Jessee, attorney for Bosel, signed the written agreement on April 6, 1992, he formally withdrew his support for it in December 1992. Mr. Walker, attorney for Weiss, and Mr. Gottstein, attorney for AMHA, both supported the Chapter 66 settlement.

On October 4, 1993, the court ruled that if a settlement received final approval in this case, all members of the class would be bound by that decision, including those objecting to the settlement.[16]

On December 30, 1993, the court denied preliminary approval of the Chapter 66 settlement because there were serious deficiencies in the proposed settlement agreement. Memorandum Decision and Order, at 122 (Dec. 30, 1993). The class was not adequately protected by the agreement because it permitted any party to terminate the settlement agreement after final approval and dismissal of the case. Memorandum Decision and Order, at 121 (Dec. 30, 1993).

[16]Class members who object to a settlement, however, may appeal a decision granting final approval.

C. HB 201 Settlement

Negotiations for a new settlement began in January 1994. In February the State made an initial offer, which was discussed by all plaintiff groups and the third party intervenors.[17] The State invited counterproposals from any of the plaintiffs attorneys, and in March Mr. Volland submitted a counteroffer involving the formation of a permanent endowment fund for the state's mental health program. None of the other attorneys submitted a counteroffer.

On April 15, the State responded to Mr. Volland's counter-proposal with additional changes, including management of trust land by DNR. At an April 25 meeting attended by Mr. Volland, representatives of beneficiaries were generally supportive of the proposal with the exception of certain land management provisions. Management of trust land by DNR was opposed by many beneficiaries or their representatives. Around this time, Mr. Walker and Mr. Gottstein indicated their dissatisfaction with the proposed settlement unless significant changes were made, but they continued to be involved in the negotiation process.

The State continued to pursue a contingency plan by advocating two sets of provisions, one for settlement and one for on-going litigation. The settlement provisions would become effective only if the case was dismissed by a specified date. Other provisions would become effective immediately and remain effective regardless of whether the case was dismissed. A few provisions would take effect immediately, but would be repealed if the case was dismissed by the specified date. In this way the State apparently hoped to better its litigation position if the settlement

[17]The Public Interest Intervenors, who were primarily interested in environmental impacts of development of lands in a reconstituted trust, played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under the new settlement. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and the oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would not suffer the attacks from outside interests which plagued the Chapter 66 settlement.

failed. These provisions and the deadline have been called "cram-down" provisions by objectors to the settlement. The inclusion of these provisions has created much ill will among many members of the class and their families, who view the State as acting unfairly.

HB 201 was passed in a special session immediately following the regular 1994 legislative session. It amended Chapter 66 and established a deadline of December 15, 1994, for final appellate and trial court approval in order for the settlement provisions to become effective. The accompanying appropriations bill, HB 371, was also passed in the special session. It appropriates $200 million for the trust fund. Governor Hickel signed both bills on June 23, 1994.[18]

After a four-day evidentiary hearing, the court found that the HB 201 settlement was within the range of possible approval and granted preliminary approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 58 (July 29, 1994). The proposed settlement was described in detail in the Memorandum Decision and Order regarding preliminary approval.[19] Id. at 13-19. However, the court identified several problems which could potentially prevent final approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-41 (July 29, 1994). Governor Hickel called a second special session of the legislature in September 1994, to give the legislature an opportunity to amend HB 201 and HB 371 before the court made a decision regarding final approval. See Ch. 1, SSSLA 1994; Ch. 2, SSSLA 1994. The legislature passed the amendments as submitted by the Governor.

One of the major amendments made during the second special session changed the deadline and conditions for the

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[18]HB 201 became Chapter 5, FSSLA 1994, and HB 371 became Chapter 6, FSSLA 1994. Because the label "HB 201" has been used in other documents, the court will continue to refer to this settlement as the "HB 201 settlement" in order to avoid confusion.

[19]Of course, this description does not include the September 1994 amendments to HB 201. Those amendments are described below.

effective date of the settlement provisions of HB 201. The legislature eliminated the requirement that all appeals must be resolved before the December 15 deadline in order for the settlement provisions to become effective and for the repeal of Chapter 66 to be prevented. See Ch. 1 § 2, SSSLA 1994, amending Ch. 66 § 58, SLA 1991, as repealed and reenacted by Ch. 5 § 37, FSSLA 1994. As long as final approval of the settlement and dismissal of the case by the superior court occurs no later than December 15, 1994, the settlement will become effective. While those opposed to settlement still may appeal final approval, such an appeal can no longer automatically destroy the entire settlement.

A second major change corrected and amended the lands lists incorporated into HB 201. See Ch. 1 §§ 4-7, SSSLA 1994; Ch. 5 § 40, FSSLA 1994 (HB 201). The corrections added 122 parcels with approximately 190,955 acres and deleted 85 parcels with approximately 124,209 acres. The Salcha mineral parcel[20] was replaced with the mineral estate in nearby parcels, which present fewer problems and greater value.[21]

The court had expressed concern that the state land contract portfolio could not be sold for the $25 million stated in HB 371. In that event, the full $200 million would not be available for the trust fund as compensation for some of the original trust lands not returned. Alternative funding sources for the $200 million appropriation to the trust fund were identified in the event the sources originally designated in HB 371 prove to be inadequate. See Ch. 2, SSSLA 1994. This was enacted to resolve the uncertainty in whether the class would get the benefit of their bargain with regard to the $200 million cash payment to the trust.

D. Description of HB 201 Settlement

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[20]The original Salcha mineral parcel had not been tentatively approved for transfer from the federal government to the state because of military use of the parcel. In addition, there were reportedly hazardous waste sites located on the parcel that would have posed a significant liability risk for the trust.

[21]The parcels replacing the Salcha mineral parcel were part of a land exchange agreement between the State and Messrs. Volland and Jessee. ~~See~~ H.L.'s Notice of Resolution of Salcha Exchange (Sept. 22, 1994).

The settlement components of HB 201 are contained in sections 3 through 9, 12 through 40, 43, 46, 47, 50, and 51. See Ch. 5, FSSLA 1994 and amendments in Ch. 1, SSSLA 1994. HB 371 contains a total appropriation of $200 million to the trust fund. See Ch. 6, FSSLA 1994 and amendments in Ch. 2, SSSLA 1994. The settlement components in Chapter 66 are contained in sections 2 through 48, 51, 52, and 58.[22] Ch. 66, SLA 1991.

Section 40 of HB 201 reconstitutes the trust with a combination of "Original Mental Health Land" and "Other State Land."[23] Ch. 5 § 40(a), FSSLA 1994. Some of the approximately 995,502 acres in the reconstituted trust will not be held in fee simple.[24] Only the subsurface estate of approximately 341,421 acres is conveyed to the reconstituted trust. Only the hydrocarbon (oil and gas) interest of approximately 104,286 acres is conveyed to the reconstituted trust. Approximately 549,795 acres in fee simple are conveyed to the reconstituted trust.

Approximately 568,814 acres of the 995,502 acres in the reconstituted trust are "Original Mental Health Land." This

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[22]HB 201 repealed parts of Chapter 66: AS 37.14.009(b) in section 10; AS 37.14.036(c) in section 11; AS 47.30.031(b)(2) in section 26; sections 49, 50, and 53 through 57. Ch. 5 § 39, FSSLA 1994.

[23]For the purpose of reconstituting the trust, the following land was designated in HB 201 as mental health trust land:

(1) the original mental health land listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which are located in the office of the director of lands, Department of Natural Resources, in Anchorage, Alaska; and

(2) the state land listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which are located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

Ch. 5 § 40(a), FSSLA 1994, as amended by Ch. 1 § 4, SSSLA 1994.

[24]A fee simple estate includes the entire bundle of possible property rights. It contains both the surface and subsurface estates.

"Original Mental Health Land," which is returned to the trust, is composed of approximately 434,456 acres in fee simple, 55,792 acres of only subsurface estate, and 78,566 acres of only hydrocarbon interest.[25] The "Original Mental Health Land" in the reconstituted trust is primarily located near the urban areas in Southeast Alaska, in the Anchorage/Kenai Peninsula area, and near Cape Yakataga, Tyonek, Lake Minchumina, Healy, Anderson, Nenana, and Fairbanks.

Under the HB 201 settlement, approximately 556,392 acres[26] of original mental health trust lands will not be returned to the trust. Compensation for these non-returned lands ["NRTL's"] will be composed of: (1) approximately 426,688 acres of "Other State Lands," (2) $200 million placed in a trust fund established for the monetary corpus of the trust, (3) establishment of an Alaska Mental Health Trust Authority to act as trustee, (4) changes in the budgeting process for mental health programs, and (5) the program improvements outlined in Chapter 66, SLA 1991.

The "Other State Lands" which are conveyed include approximately 115,339 acres in fee simple, approximately 285,629 acres of subsurface estate only land, and approximately 25,720 acres in hydrocarbon interest only land. The subsurface and fee simple interests in "Other State Lands" are located primarily southeast of Chena Hot Springs, just north of Fairbanks, northwest of McGrath, in the Livengood area,[27] around Delta Junction, near Tok, northwest of Haines, north of Sitka, and numerous other locations in Southcentral and Southeast Alaska. The hydrocarbon interests are located in the lower Kenai peninsula and lower Susitna

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[25]The subsurface estate or hydrocarbon interests are subsurface interests conveyed to the Trust Authority where the surface estate has been conveyed to a third party or another state use, but the surface use is not incompatible with subsurface development. For example, mineral exploration and development is a permitted activity in the Matanuska Valley Moose Range. Thus, the subsurface rights to original mental health trust lands in the Moose Range are returned to the trust.

[26]The Non-Returned Trust Lands are composed of approximately 423,000 acres in fee simple and approximately 133,500 acres of surface estate.

[27]The Livengood area has been the location of mining activity in the past.

Valley. The Salcha replacement mineral parcel comprises more than half the acreage of subsurface estate only land in the "Other State Land" category.[28]

The Settlement Agreement submitted to the court on June 10, 1994, requires most of the land to be conveyed to the Trust Authority prior to final approval of the settlement. Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). The Agreement calls for the State to tender to the court the deeds for conveying to the trust authority the lands to be included in the reconstituted trust prior to dismissal of this action.[29] Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). Accordingly, the State tendered non-recordable deeds with attached plats on the last day of the fairness hearing.

DNR normally issues patents, which technically are a form of quitclaim deed. The HB 201 calls for the State to issue quitclaim deeds to Trust Authority rather than warranty deeds. However, the State has warranted in the Settlement Agreement that it has legal authorization to convey the land to the Trust Authority. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994). If the warranty is violated, the trust will be compensated with other land. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

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[28]A replacement parcel was chosen because there was no assurance that the federal government would ever convey the original Salcha parcel to the State. The replacement parcel is larger than the original parcel and has a value equal to or greater than the original parcel. The replacement parcel was substituted for the original on the list of "Other State Land To Be Designated as Mental Health Trust Land" as part of the amendments passed during the Second Special Session of the Legislature in September 1994.

[29]The Agreement acknowledges that full legal descriptions may not be available at the time the action is dismissed. Settlement Agreement, art. IV, § 1, at 7. However, the State has agreed to use its best efforts to complete recordable deeds for delivery to the trust authority as soon as practicable after dismissal. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). The interim deeds describe parcels by number and reference to maps attached to the interim deeds. The State will bear the recording costs for all documents required by the settlement. Settlement Agreement, art. IV, § 5, at 9-10 (June 10, 1994).

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed to the Trust Authority as the State receives them. DNR has agreed to consult the Trust Authority when the annual conveyance priorities are submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). If such land parcels are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

The Alaska Mental Health Trust Authority, which is created by Chapter 66 to act as trustee for the mental health lands trust,[30] "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of the Alaska Mental Health Enabling Act." Ch. 5 § 9, FSSLA 1994; Ch. 66 § 10, SLA 1991, as amended by Ch. 5 § 8, FSSLA 1994; Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 26, FSSLA 1994. The Trust Authority is required to contract with DNR to manage the land assets of the trust. Ch. 5 § 9, FSSLA 1994. A separate unit of DNR must be established whose sole assignment will be to manage the reconstituted land corpus of the trust. Ch. 5 § 22, FSLA 1994.

Section 17 of HB 201 lists the general standards applicable to DNR's management of lands in the reconstituted trust:

> (a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).
>
> (b) Subject to (a) of this section, the department

[30] A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1994 (to be codified as AS 47.30.016(b)). Board members must be appointed by the governor and confirmed by the legislature. Ch. 5 § 24, FSSLA 1994.

(1) shall manage mental health trust land under those provisions of law applicable to other state land;

(2) may exchange other state land for mental health trust land under procedures set out in AS 38.50; and

(3) may correct errors or omissions in the legal descriptions of mental health trust land.

(c) The commissioner [of DNR] shall adopt regulations under AS 44.62 (Administrative Procedures Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address

(1) maintenance of the trust land base;

(2) management for the benefit of the trust;

(3) management for long-term sustained yield of products from the land; and

(4) management for multiple use of trust land.

Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801). The four management provisions which must be addressed in the regulations are based on a law review article discussing management principles for public trust lands. See Fairfax, Souder, & Goldenman, The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 900-908 (1992). The regulations for DNR's management of trust lands will be adopted through the usual public rulemaking procedures during which the beneficiaries and the public will have an opportunity to comment. See Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801(c)).

In addition, DNR is required to consult the Trust Authority before adopting regulations for the management of trust land. See Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(B)).

The Settlement Agreement requires DNR to "consult a transition team of representatives from the beneficiary community" during the development of the initial policies and procedures for the DNR unit managing trust land. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). DNR Commissioner Harry Noah has been consulting with the transition team. This arrangement seems to be working well. Final Hearing (Oct. 25, 1994). Section 9 of HB 201 includes DNR's general obligations to the Trust Authority. When DNR manages trust land under a contract with the Trust Authority, DNR is required to:

> (A) manage in conformity with AS 38.05.801;
>
> (B) consult with the authority before adopting regulations under AS 38.05.801(c);
>
> (C) provide notice to, and consult with, the authority regarding all proposed actions subject to public notice under AS 38.05.945 before giving that public notice;
>
> (D) annually provide the authority with a report including
>
> > (i) a description of all land management activities undertaken under this section during the prior year;
> >
> > (ii) an accounting of all income and proceeds generated from mental health trust land;
> >
> > (iii) an explanation of the manner in which the income and proceeds

> were allocated between the mental health trust fund and the mental health trust income account; and
>
> (E) obtain the approval of the authority before exchanging mental health trust land under AS 38.05.801(b)(2).

Ch. 5 § 9, FSSLA 1994.

HB 201 designates the Alaska Permanent Fund Corporation to manage the investment of the monetary corpus of the trust, the "mental health trust fund," which will receive the $200 million cash payment from the State.[31] Ch. 5 §§ 3 and 9, FSSLA 1994. Both DNR and the Permanent Fund Corporation must keep the Trust Authority informed with regularly published reports.[32] Ch. 5 §§ 3 and 9, FSSLA 1994.

Earnings from the trust fund and the trust lands must be deposited in a trust income account. Ch. 5 §§ 3, 14, and 15, FSSLA 1994. The Trust Authority will administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The Trust Authority is required to use money from the trust income account for providing an integrated comprehensive mental health program, offsetting the effects of inflation on the trust fund, and meeting the necessary administrative expenses of the Trust Authority. Ch. 5 § 28, FSSLA 1994 (to be codified as AS 47.30.056(a)). Among other things, the money in the income account also may be used to reimburse the Permanent Fund

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[31]The principal of the trust fund is to be "retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." Ch. 5 § 14 (to be codified as AS 37.14.035(a)). The Trust Authority is required to contract with the Alaska Permanent Fund Corporation for management of the mental health trust fund. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(3)).

[32]DNR must provide an annual report to the Trust Authority that includes: (1) a description of all land management activities undertaken during the prior year; (2) an accounting of all income and proceeds generated from mental health trust land; and (3) an explanation of the manner in which the income and proceeds were allocated between the corpus and income of the trust. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(D)).

Corporation and DNR for the cost of managing trust assets, to award grants and contracts for mental health programs, to obtain private and federal grants and to solicit gifts, bequests, and contributions for the mental health program. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041(a)).

The Settlement Agreement expressly states the Trust Authority will have the power to allocate money from the trust income account without further legislative involvement.[33] Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). Section 16 of HB 201 states that the income account will be administered by the Trust Authority and lists the specific uses for which money from the trust income account may be used and the requirements for grants and contracts awarded by the Trust Authority to further the mental health program.[34] See Ch. 5 § 16, FSSLA 1994.

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the

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> Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of, further legislative appropriation.

Settlement Agreement, art. V, § 4, at 12 (June 10, 1994).

[34]Attorneys for Weiss and AMHA submitted a draft letter of intent to the legislature in the Second Special Session, stating that the legislature intended the Trust Authority to have the power to make expenditures from the trust income account without legislative appropriation. Final Hearing, Weiss Exh. 18. The letter was not adopted by the legislature. The court does not believe that the legislature's refusal to adopt the proposed letter of intent can be interpreted as an expression of contrary legislative intent. The Second Special Session was called for a particular purpose; the attorney general's office ultimately determined that the letter of intent went beyond the call.

Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

HB 201 requires the governor to submit to the legislature a separate appropriations bill limited to the comprehensive mental health program. Ch. 5 § 4, FSSLA 1994. Similarly, the legislature is required to pass appropriations for the program in a separate bill. Ch. 5 § 7, FSSLA 1994. If the bill submitted by the governor or passed by the legislature differs from the Trust Authority's recommendations for appropriations from the state's general fund, a report must accompany the bill explaining the reasons for the differences. Ch. 5 §§ 5 and 7, FSSLA 1994. The governor must make a similar explanation of any veto of an appropriation for the state's comprehensive mental health program. Ch. 5 § 6, FSSLA 1994.

By January 1, 1996, the Trust Authority must have adopted regulations regarding (1) persons who are to receive services funded by trust income and (2) the services and facilities upon which expenditures are to be made from money in the trust income

account.[35] Ch. 5 § 43, FSSLA 1994. The Trust Authority's task is aided by the detailed definitions in Chapter 66. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(j)).[36] The persons who are to receive services funded by the trust income account, the beneficiaries, are defined by several diagnoses within each of the four beneficiary groups identified by the court in 1988. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)-(g)). Priority in service delivery among the beneficiaries must be given to individuals who (A) may require or are at risk of hospitalization, or (B) experience such major impairment of self-care, self-direction, or social and economic functioning that they require continuing or intensive services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(c)). Chapter 66 defines "integrated comprehensive mental health program" in terms of a wide variety of possible services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(i)). Services are also addressed in amendments to the Community Mental Health Services Act, which focuses on community based services. Ch. 66 §§ 28-35, SLA 1991 (to be codified as AS 47.30.520-.610), as amended by Ch. 5 §§ 30-32, FSSLA 1994.

Chapter 66 and HB 201 both amend AS 47.30.660, which outlines the general responsibilities of the Department of Health and Social Services ("DHSS") with regard to the state's mental health program. See Ch. 66 § 36, SLA 1991; Ch. 5 § 33, FSSLA 1994. Chapter 66 requires DHSS to plan for "an integrated comprehensive mental health program" in conjunction with the Trust Authority and, through the Division of Mental Health and Developmental Disabilities, administer a comprehensive program of services. Ch. 66 § 36, SLA 1991. HB 201 clarified that DHSS's duty to implement an integrated comprehensive system of mental health care which meets the needs of trust beneficiaries was constrained by "the limits of money appropriated for that

[35]The Trust Authority also must publish estimates regarding the number of persons in need of the services funded by the trust income account and projections of the necessary expenditures for from the trust income account by January 1, 1996. Ch. 5 § 43, FSSLA 1994.

[36]AS 47.30.056(a) added by Chapter 66 was amended by section 28 of HB 201.

purpose and using grants and contracts that are to be paid for from the mental health trust income account." Ch. 5 § 33, FSSLA 1994 (to be codified as AS 47.30.660(a)(3)).

III. DEFINITION OF THE CLASS

This case was certified as a class action under Alaska Civil Rule 23(b)(2). Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor). Class action lawsuits are "(b)(2)" actions when only injunctive or declaratory relief with respect to the class as a whole has been requested, and no monetary relief will be distributed to individual class members.[37] The relief sought in this case is reconstitution of the mental health lands trust with the hope that this will lead to improved state mental health services. Individual compensation to class members has never been contemplated. Relief in a (b)(2) action is focused on the class as a whole, therefore class members do not have the right to opt out of the action or a settlement of it. In addition, no member or segment of the class has veto power over a settlement, although the court must carefully consider substantial objections as an indication that a settlement might not be fair to the class.

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[37]The pertinent portions of Alaska Civil Rule 23 provide:

> (a) ~~Prerequisites to a Class Action~~. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) ~~Class Actions Maintainable~~. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . .
>
> (2) The party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

In 1983, the class was defined in accordance with the original complaint, which stated that the plaintiffs were recipients of state mental health services who needed continuing services that were not available in the State of Alaska. Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor); Complaint, at 1 (Nov. 26, 1982). In 1987, Bosel moved for a declaration that mentally retarded and mentally defective individuals were among the intended beneficiaries of the trust when it was established in 1956. See Bosel's Motion for Partial Summary Judgment (July 14, 1987). In response to Bosel's motion and extensive briefing, the court determined that the beneficiaries were composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" including "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 & n.6 (April 27, 1988).[38]

The class definition was modified August 2, 1994. The class was redefined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition, at 1-2 (Aug. 2, 1994). Section 26 of Chapter 66, which will become effective Dec. 16, 1994,

[38]In addition, the court concluded that it was within the discretion of the legislature to include other groups as recipients of services by mental health programs, as long as the groups specifically described in the court's order were not excluded. Memorandum Decision and Order, at 17 (April 27, 1988).

defines each of the four main categories of beneficiaries. Ch. 66 § 26, SLA 1991.[39]

IV. NOTICE

Alaska Civil Rule 23(e) requires that notice of a settlement be sent to members of the class in whatever manner the court directs.[40] Alaska R. Civ. P. 23(e). Notice to the class of a

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[39]In section 26, "the mentally ill" includes persons with: (1) schizophrenia; (2) delusional (paranoid) disorder; (3) mood disorders; (4) anxiety disorders; (5) somatoform disorders; (6) organic mental disorders; (7) personality disorders; (8) dissociative disorders; (9) other psychotic or severe and persistent mental disorders manifested by behavioral changes and symptoms of comparable severity to those manifested by persons with the other listed mental disorders; (10) persons who have been diagnosed by a licensed psychologist, psychiatrist, or physician licensed to practice medicine in the state and, as a result of the diagnosis, have been determined to have a childhood disorder manifested by behaviors or symptoms suggesting risk of developing a mental disorder listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)).

"Mentally defective and retarded" includes persons with: (1) cerebral palsy; (2) epilepsy; (3) mental retardation; (4) autistic disorder; (5) severe organic brain impairment; (6) significant developmental delay during early childhood indicating risk of developing a disorder listed above; (7) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(e)).

"Chronic alcoholics suffering from psychoses" includes persons with: (1) alcohol withdrawal delirium (delirium tremens); (2) alcohol hallucinosis; (3) alcohol amnestic disorder; (4) dementia associated with alcoholism; (5) alcohol-induced organic mental disorder; (6) alcoholic depressive disorder; (7) other severe and persistent disorders associated with a history of prolonged or excessive drinking or episodes of drinking out of control and manifested by behavioral changes and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(f)).

"Senile people who as a result of their senility suffer major mental illness" includes persons with: (1) primary degenerative dementia of the Alzheimer type; (2) multi-infarct dementia; (3) senile dementia; (4) presenile dementia; (5) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(g)).

[40]The Civil Rule 23(e) notice requirement is based in part on due process because the settlement of a class action will have res judicata effects on all class members. ~~In re Agent Orange Product Liability Litigation~~, 597 F. Supp. 740, 759

proposed settlement and the fairness hearing assures class members (1) an opportunity to support or oppose the settlement and to alert the court to provisions in the settlement that may be contrary to the interests of the class as a whole or subgroups within the class; and (2) that their "integrity and right to express views and be heard on matters of vital personal interest has not been violated by others who abrogated to themselves the power to speak and bind without consultation and consent." In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 758 (E.D.N.Y. 1984).

Individual notice to every class member of a (b)(2) class is not necessary as long as a representative portion of the class or their guardians are contacted, because members of the class cannot opt out of the class or settlement and identification of all class members may be difficult. See, e.g., Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 (3rd Cir. 1983); Harris v. Pernsley, 654 F. Supp. 1042, 1048 (E.D. Pa. 1987). Sometimes notice by publication is sufficient to satisfy constitutional due process requirements in a (b)(2) action. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980). The court must consider the nature of the class and the case when the court decides the appropriate form and content of notice and the method of distribution. This is a reason why the specific manner of giving notice of a proposed settlement is left to the discretion of the trial court. The court decided that notice only by publication would have been inadequate in this case, given the limitations and special needs of many class members.

In the present case, the balance between providing enough information for the class to evaluate the settlement and making the notice understandable to as many class members as possible was a difficult one. See Newberg on Class Actions § 8.32, at 8-103 to 8-104 (3d ed. 1992). The text was kept as simple and as short as possible given the constraints of accuracy and completeness. See id. A few written comments stated the notice did not provide

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(E.D.N.Y. 1984), ~~citing Grunin v. International House of Pancakes~~, 513 F.2d 114, 120 (8th Cir.), ~~cert. denied~~, 423 U.S. 864, 96 S. Ct. 124, 46 L.Ed.2d 93 (1975).

sufficient information. Others complained that the notice was too long and complex for most class members to understand.

Other sources of information were listed for those who wanted more information. The names and phone numbers of attorneys for the class were provided in the notice. The court also made available a public information sheet explaining that the court file for this case encompassed over 100 volumes and listing the volumes which contained documents relevant to the HB 201 settlement.

The court recognized that the notice would be too detailed for some dass members. Family members, guardians, or other advocates for class members were relied upon to explain the notice to class members or otherwise to represent the interests of individual class members.

The fact that the class was defined in terms of those who suffer from mental illness, alcoholism, mental retardation, and senility made direct notice to individually identified class members impossible. The stigma that mental illness continues to carry in American society raises issues of class members' right to privacy under article I, section 22 of the Alaska Constitution. The Alaska Supreme Court has recognized that psychiatric or psychological treatment is information which patients would normally seek to keep private. Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469, 480 (Alaska 1977). The simple release of names and addresses of patients by mental health service providers would reveal that those individuals had sought treatment for a mental illness. This would violate the patients' right to privacy and the confidentiality of communication between physician/psychotherapist and patient. See Falcon, 570 P.2d at 479-80; accord Ziegler v. Superior Court for the County of Pima, 656 P.2d 1251, 1255-56 (Ariz. Ct. App. 1982).

Direct notice to all class members was impossible for other reasons as well. The current addresses of past trust beneficiaries could be difficult to ascertain and individual identification of future beneficiaries who are not presently receiving services would be

impossible. See Harris v. Pernsley, 654 F.Supp. at 1048. The solution proposed by some of the parties and adopted by the court was a mass mailing to all Alaskan addresses. This provided actual notice to approximately 270,000 addresses.

The mass mailing had the advantage of reaching potential class members in even the smallest villages served by the United States Postal Service. Publication alone could not accomplish this. In addition, the mailed notice included a comment form to encourage recipients of the notice to comment on the proposed settlement. On August 2, 1994 the court approved the text of the notice to be given by mass mailing. By August 19, 1994, the notices had been sent by third-class mail. A copy of the notice is in Appendix A. The plaintiffs' attorneys provided versions of the notice on audio cassette, in Braille, large print, Spanish, Filipino, Inupiaq, and Yupik. These versions of the notice were made available upon request or in public areas along with the standard English version.

Beginning August 12, 1994, the State published the court-approved notice one time per week for three consecutive weeks in each of Alaska's 23 largest newspapers, with four minor variations in this schedule.[41] The complete text of the notice was published in a legal advertisement along with a display advertisement located in another part of the same edition drawing attention to the legal notice. The court approved the text of a large display advertisement on September 23, 1994. The advertisement was four columns

[41]The court's order required publication in the 22 largest newspapers. The State ranked newspapers by total paid subscribers as listed by the Alaska Journal of Commerce Book of Lists 1994 at page 21. When the notice was published, however, the Prince William Sounder, had divided into two newspapers, the Valdez Vanguard and the Cordova Times. This brought the total to 23 newspapers in which the notice was published.

The advertisements were printed in the Alaska Journal of Commerce on August 22 and 29, and September 5, 1994. Because the Tundra Times publishes every other Wednesday, advertisements were printed on August 24, September 7 and September 21, 1994. The Senior Voice is published only monthly, and advertisements were published in the September and October issues. The Southeast Alaska Business Journal also publishes monthly, and advertisements were published in the August and September issues.

(eight inches) wide by twelve inches high. The display advertisement was published four consecutive weeks in the Sunday edition of the Anchorage Daily News, the Fairbanks Daily News-Miner, and the Juneau Empire beginning September 25 and continuing through October 16, 1994.

Public service announcements were sent to all radio and television stations in Alaska by the middle of September. The public service announcements briefly informed listeners of the existence of the settlement and where more information could be obtained. An additional information sheet written by the State was available at DNR Information Offices and Legislative Information Offices.

The State was also required to send notices to providers of mental health, alcoholism, and homeless services by the end of August 1994. Accordingly, around August 24, 1994, the State sent notices to approximately 1,400 providers[42] of mental health, alcoholism, and homeless services, including shelters, soup kitchens and other programs designed to assist homeless people. Posters accompanying the notices were made from enlarged versions of the notice. A letter was included requesting the provider to distribute the notices to current clients and other interested persons. Notices were also provided to and distributed by the Alaska Department of Corrections in the state's correctional facilities in order to notify those inmates who are also class members.

Plaintiffs' attorneys and advocacy groups held a few meetings for beneficiaries and their families or guardians to explain the settlement and to answer questions about it. In addition, because this is a high-profile case, news reports in both the print and broadcast media provided the public with some information about the proposed settlement and the legislature's actions with regard to the settlement.

Notice to the class started in mid-August and lasted until October 16, 1994, a total of nine weeks. The period for receiving

[42]The list of providers was compiled by Jeff Jessee, counsel for Bosel.

written comments continued through October 21, 1994. Notice was first sent ten weeks prior to October 24, when the final approval hearing began in Anchorage. Therefore, a reasonable[43] time period was provided between notice and final hearing, during which class members and their families or other representatives could investigate the settlement further and reflect on the matter before taking a position. See In re Agent Orange, 597 F. Supp. at 759.

V. FINAL APPROVAL

A. Standard

Final approval requires that the settlement as a whole be "fair, adequate, and reasonable."[44] Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); Newberg on Class Actions § 11.41, at 11-91 (3d ed. 1992). However, a "settlement need not provide the best or speediest relief imaginable to be fair, adequate, and reasonable." Officers for Justice, 688 F.2d 615, 636 (9th Cir. 1982). In evaluating the fairness of a settlement, it must be remembered that "compromise is the essence of a settlement."

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[43]What constitutes a "reasonable time" varies from case to case. Agent Orange, 597 F. Supp. at 759; see Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). The length of time seems to vary from approximately two weeks to three months. See, e.g., Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984) (30 days); Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 961 (3rd Cir. 1983) (one month); Williams, 720 F.2d at 921 (two weeks is a minimum); Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982)(six weeks); Mendoza v. United States, 623 F.2d 1338, 1348 (9th Cir. 1980) (nearly a month); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977) (26 days); Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 838 (9th Cir. 1976) (one month); Grunin v. International House of Pancakes, 513 F.2d at 121 (19 days); Agent Orange, 597 F.Supp. at 759-60 (three months); Bronson v. Board of Education, 604 F. Supp. 68, 72 (S.D. Ohio 1984) (approximately 20 days).

[44]Preliminary approval is not a fairness determination. It is a finding by the court that the proposed settlement is sufficiently within the range of possible approval to justify notifying of the class and proceeding with a final approval hearing. Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). Final approval of the settlement remains discretionary with the court even after preliminary approval is granted. See Newberg on Class Actions §11.41, at 11-88 (3d ed. 1992).

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).[45] Every concern of the class need not be satisfied in order for a settlement to be fair. Alliance to End Repression v. City of Chicago, 91 F.R.D. 182, 195 (N.D. Ill. 1981). A fair settlement may fall anywhere within a broad range of upper and lower limits. See Alliance to End Repression, 91 F.R.D. at 195.

Factors which courts usually consider in deciding whether to grant final approval include:

> (A) comparison between the likely result of litigation and the remedy in the settlement;
>
> (B) expense, complexity, and likely duration of further litigation;
>
> (C) reaction of the class to the settlement, number of objectors, and nature of objections;
>
> (D) experience and views of counsel;
>
> (E) defendant's ability to pay (feasibility of settlement);
>
> (F) extent of discovery completed; and
>
> (G) presence of collusion in settlement negotiations.[46]

See Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Malchman v. Davis, 706 F.2d 426, 433-34 (2nd Cir. 1983); Armstrong v.

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[45]A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. Armstrong v. Board of School Directors, 616 F.2d 305, 317 (7th Cir. 1980).

[46]The court conducted an evidentiary hearing in July concerning the presence or absence of collusion in reaching the settlement. The court found no evidence of collusion in the negotiations. No further evidence or allegations regarding the conduct of negotiations have arisen. The court will not discuss this factor further. The earlier determination of no collusion stands.

Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); Newberg on Class Actions § 11.43, at 11-97. The relative degree of importance attached to each factor depends upon the claims, facts, and circumstances of each case.[47] Officers of Justice v. Civil Service Comm'n., 688 F.2d 615, 625 (9th Cir. 1982).

Most of these factors were discussed in the court's decision granting preliminary approval. See Memorandum Decision and Order, at 45-57 (July 29, 1994). The court specifically found no evidence of collusion or any other significant impropriety in the negotiation process. Id. at 23-30, 57. The preliminary approval decision also identified several concerns of the court that potentially could prevent final approval. Id. at 31-42. Therefore, the court has focused on these factors in deciding whether to grant final approval: (1) the extent to which problems identified by the court in the decision regarding preliminary approval have been resolved; (2) a comparison between the settlement and further litigation[48] including the expense, duration, and complexity of trial litigation; and (3) the nature and amount of class opposition to the settlement. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-57 (July 29, 1994). Other factors are discussed more briefly.

It must be remembered that the court is reviewing a class settlement proposal rather than ordering a remedy in a litigated case. Armstrong, 616 F.2d at 314-15. The court did not undertake the kind of detailed and thorough investigation that it would undertake if it were actually trying the case.[49] See Armstrong, 616

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[47]For example, where no monetary relief is sought, the defendant's ability to pay of no importance, although the feasibility of the requested relief may remain relevant.

[48]This includes an evaluation of the difficulties in proving the plaintiffs' claims to land in which third-parties have an interest and the strength of the State's claim to a setoff for past mental health expenditures.

[49]In this case, the final hearing lasted two full weeks. However, a trial of the same factual issues undoubtedly would have lasted much longer, and a trial of the entire case would involve many additional factual and legal issues. ~~Cf. Officers of Justice~~, 688 F.2d at 625 (final hearing should not be turned into a trial or rehearsal for trial on the merits).

F.2d at 315. Nothing in this Memorandum Decision can be viewed as a judgment with regard to the ultimate factual and legal issues underlying the merits of the present litigation.

The court's role in determining whether a settlement is fair, adequate, and reasonable is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315; Holden v. Burlington Northern, 665 F.Supp. 1398, 1406 (D. Minn. 1987). A court may not substitute its own judgment regarding the optimal possible settlement for the judgment of the litigants and their counsel. Armstrong, 616 F.2d at 315; In re Agent Orange, 597 F.Supp. at 759. A proposed settlement should not be judged against some hypothetical ideal of what might have been achieved in the best possible negotiations. Officers of Justice, 688 F.2d at 625; In re Agent Orange, 597 F.Supp. at 762. It also should not be judged in comparison with the maximum possible recovery if the class succeeded in all claims. See In re Agent Orange, 597 F.Supp. at 762. The risks accompanying continuation of litigation must be considered simultaneously with the strengths of class' case. Holden v. Burlington Northern, Inc., 665 F.Supp. at 1408; see also In re Agent Orange, 597 F.Supp. at 762 (settlement judged in light of the strengths and weaknesses of plaintiffs' case"). A settlement is a bilateral compromise in which certain rights or benefits are given up in return for others, where both sides gain as well as lose something. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1135 (7th Cir. 1979).

Settlement involves compromise on both sides even when the liability of the defendant has already been established, as it has here. There may be a tendency for many class members to object to any compromise in the remedial portion of a case once liability is established. See Armstrong, 616 F.2d at 316. Understandably, a compromise on the remedy may appear to be allowing the defendant to escape with little penalty while leaving the class inadequately compensated. Yet in some class actions, such as this one, the remedial portion of the case can surpass the liability portion in terms of complexity and duration. See Armstrong, 616 F.2d at 324. In such cases, compromise on the remedial issue after the defendant is held to be liable may indeed be quite reasonable.

B. Burden of Proof

The parties do not agree regarding the appropriate burden of proof[50] for final approval.[51] The Alaska Supreme Court has not ruled on this specific issue.

Proponents of the settlement have the burden of providing the court with sufficient background and other information about the case to enable the court to evaluate the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95; MCL 2d § 30.44, at 241-42 ("the burden is on the proponents to show that the settlement should be approved"); accord In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 312 (N.D. Ga. 1993); Steiner v. Fruehauf Corp., 121 F.R.D. 304, 306 (E.D. Mich. 1988); Wattleton v. Ladish, 89 F.R.D. 677, 680 (E.D. Wis. 1981). Because settling plaintiffs and settling defendants in a class action are both proponents of the settlement, they are no longer adversaries with respect to the request for court approval of the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95. In a class action the court always has the responsibility of protecting the class because of the opportunities for abuse peculiar to class actions. See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1122 (7th Cir.), cert. denied, 444 U.S. 870, 62 L.Ed.2d 95 (1979); see also MCL 2d § 30.41, at

[50]The burden of proof in this context is not the burden of proving the merits of the parties' claims or defenses. The most important factor in final approval is a comparison between the likely results of further litigation with the likely results of the proposed settlement in order to determine the adequacy of the settlement for the class. The overall burden of proof for final approval relates to the fairness, adequacy, and reasonableness of the settlement.

[51]The ~~United States v. Oregon~~, 913 F.2d 576 (9th Cir. 1990), has been cited by the State for the proposition that the burden of proof should be on opponents of a settlement. ~~See~~ State's Opening Pre-Hearing Mem. Sup. Final Approval, at 3 n.2 (Oct. 11, 1994), ~~citing~~ ~~U.S. v. Oregon~~, 913 F.2d 576, 579-80 (9th Cir. 1980), ~~cert. denied~~ ~~Makah Indian Tribe v. United States~~, 501 U.S. 1250 (1991). Counsel for Weiss and AMHA have cited ~~In re General Motors Corp. Engine Interchange Litigation~~, 594 F.2d 1106 (7th Cir. 1979), for the proposition that the proponents of the settlement have the burden of proving with clear and convincing evidence that the settlement is fair, adequate and reasonable. Weiss & AMHA's Response Brief, at 7 (Oct. 19, 1994). Neither side is totally correct.

236 (court must assure that eagerness of settling parties to avoid trial in a class action does not result in a settlement that is adverse to the interests of some or all class members). In order to assure that the interests of the class are protected, the court must independently analyze the evidence and recommendations. See Newberg on Class Actions § 11.42, at 11-95 to 11-96. Therefore the settling parties have an obligation to furnish adequate information to enable the court to independently reach its own determination of reasonableness, adequacy, and fairness whether or not opposition to the settlement exists. Newberg on Class Actions § 11.42, at 11-96.

At the final approval hearing, "counsel for the settling parties typically are called upon to make an appropriate showing on the record why the settlement should be approved." MCL 2d § 30.42, at 238. The amount of detail with which the settling parties must show why the settlement should be approved depends on the circumstances of the case, particularly opposition among the class. MCL 2d § 30.42, at 238; cf. In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 761 (E.D.N.Y. 1984) (fairness, reasonableness and adequacy must be judged in light of the "totality of circumstances"); Axinn & Sons Lumber Co. v. Long Island Railroad, 90 F.R.D. 2, 5 (E.D.N.Y. 1979) (where defendant's liability has been established, any party attempting to justify settlement amounting to only a small fraction of the possible recovery has substantial burden of proof).

If there is no evidence of collusion or other improprieties, the burden of proof is on proponents of a settlement to convince the court by a "preponderance of the evidence" that the settlement is fair, reasonable, and adequate.[52] Holden v. Burlington Northern, Inc., 665 F.Supp. 1398, 1407 & n.10 (D. Minn. 1987); accord In re

[52]Irregularities in negotiations increase the burden. For example, in ~~In re General Motors Corp. Engine Interchange Litigation~~, the Seventh Circuit stated that "although the proponents of any class settlement always bear the burden of proof on the issue of fairness, proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence." ~~In re General Motors Corp. Engine Interchange Litigation~~, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979).

General Motors Corp. Engine Interchange Litigation, 594 F.2d at 1126 n.30; Welsch v. Gardebring, 667 F.Supp. 1284, 1290 (D. Minn. 1987).

Some courts have stated that if a settlement is recommended by experienced class counsel after arm's-length bargaining during settlement negotiations, a court may presume the settlement is fair. See In re Union Carbide Corp. Securities Litig., 718 F.Supp. 1099, 1103 (S.D.N.Y. 1989);[53] see also Newberg on Class Actions § 11.42, at 11-94 to 11-95. However, the particular facts here do not support any such presumption. The present case involves strong opposition from half of the class attorneys, one of the original named plaintiffs,[54] and perhaps as much as one-third of the class.

Weiss and AMHA have urged the court to impose a burden of persuasion of "clear and convincing" evidence. The only case relied upon by Weiss and AMHA which imposed such a burden did so because of collusion or improprieties during negotiations. See In re General Motors, 594 F.2d at 1126 n.30.

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[53]The Sixth Circuit has indicated that after preliminary approval, a presumption of validity usually should attach to the proposed settlement and objectors then have a heavy burden to demonstrate that the settlement is not fair, reasonable, and adequate. E.g., Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). In a shareholder suit against corporation executives, a district court in Ohio stated:

> The proponents of the settlement have the burden of persuading the Court that the compromise is fair, reasonable and adequate. With the Court's preliminary approval of the stipulation, the proponents satisfy this burden and the settlement is presumptively reasonable. The burden then shifts to the objecting shareholders who have a heavy burden of demonstrating that the decree is unreasonable.

Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 454 (N.D. Ohio 1993)[citations omitted]; see Whitford v. First Nationwide Bank, 147 F.R.D. 135, 138-39 (W.D. Ky. 1992); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 246 (S.D. Ohio 1991); In re Dun & Bradstreet Credit Services Customer Litigation, 130 F.R.D. 366, 370 (S.D. Ohio 1990).

[54]Vern Weiss, father and next friend of Carl Weiss, a minor child when this litigation began, strongly opposes the HB 201 settlement. Final Hearing (Nov. 2, 1994).

The court has rejected that basis here. Moreover, the court does not find any other irregularity which would argue in favor of the higher burden of proof.

The court concludes that during this final approval process, the proponents have the burden of proving by a preponderance of the evidence that HB 201 offers a fair, adequate, and reasonable settlement of this class action.

C. Extent to which Problems Identified by the Court in the Decision Regarding Preliminary Approval Have Been Resolved.

In the preliminary approval decision, the court expressed concern about the likelihood that the State's land contract portfolio could not be sold for the $25 million stated in HB 371.[55] In that event, the full $200 million would not be available for deposit in the trust fund. The amendments passed during the second special legislative session included designation of additional sources of funds if the original sources designated in HB 371 are insufficient. Ch. 2 §§ 4-5, SSSLA 1994. Therefore, the availability of the full $200 million for the trust fund is assured.

HB 201 originally included 116,000 acres of subsurface estate near Salcha in the reconstituted trust that were selected by the State but not tentatively approved by the federal government for conveyance due to a continuing military claim to the land. The legislature deleted this parcel from the list of lands to be included in the reconstituted trust in the second special session. A replacement parcel comprising 184,320 acres of subsurface estate in the same region was added to the list of trust parcels. Ch. 1 §§ 4-7, SSSLA 1994. All parties agree that this replacement parcel is at least equal in total value to the original 116,000-acre parcel.[56]

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[55]HB 371 is Ch. 6, FSSLA 1994. HB 371 appropriated money from four different sources to fund the $200 million payment. Ch. 6 § 1, FSSLA 1994.

[56]DNR estimated the total value for the original parcel to be $97 million and the total value for the replacement parcel to be $110 million. The mineral consultants hired by proponents and opponents of the settlement both concluded that the total value for the Salcha replacement parcel exceeded the value of the first Salcha

Therefore, the previous uncertainty over conveyance of approximately one-tenth of acreage of the reconstituted trust has been satisfactorily resolved.

Other corrections to the land lists referenced in HB 201 also were made. Ch. 1 §§ 4-7, SSSLA 1994. Some of the errors had been identified by opponents of the settlement and others were identified by DNR. These corrections were primarily technical in nature and did not significantly affect the value or total acreage of the settlement. However, the land lists accompanying HB 201 are now more accurate.

The legislature eliminated the problem of an appeal potentially destroying the settlement. The condition that all appeals be resolved before the December 15th deadline in order for the settlement provisions of HB 201 to become effective was eliminated in the second special session. Ch. 1 § 2, SSSLA 1994. As long as final approval and dismissal of the case in the superior court occur no later than December 15, 1994, the settlement provisions of HB 201 will become effective.

One problem which still remains is the absence of specific guidance for DNR's management of the reconstituted trust lands. Many class members distrust DNR and are adamantly opposed to management of trust lands by DNR despite the establishment of a separate unit in DNR to manage the lands. In addition, several class members expect mining and other resource development interests to exert heavy influence when DNR adopts regulations for management of trust lands. While both the developers and the trust will desire to make money from land resources, developers and the trust beneficiaries will not always have the same goals and interests in the management of these lands.

Improper management on the part of DNR is likely to lead to another lawsuit, something the State would undoubtedly like to

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parcel. ~~See~~ Final Hearing, Exh. AJ (assessment prepared by Behre Dolbear & Co.) and Exh. AL (Letter from Dr. Paul Metz to David Walker and James Gottstein).

avoid. A separate DNR unit managing trust lands will not have the conflicting objectives and policies that may have contributed to the previous failure of DNR to meet its fiduciary duties with respect to trust land. Personnel in a separate unit can be trained in trust land management. Land management decisions within the unit will pertain only to trust land. Within the unit at least, a proposal to sell a trust land parcel will not need to compete with a proposal to sell other state land.

The settlement establishes oversight of DNR management by the Trust Authority. The Trust Authority will essentially be DNR's client. It will be difficult for DNR to justify acting against the advice of the Trust Authority. The actions of the separate DNR trust lands unit are likely to be closely scrutinized by mental health advocates.

When DNR adopts regulations for the mental health trust lands unit, the public and mental health advocates will have an opportunity to comment and, if necessary, challenge the regulations. See generally AS 44.62 (Administrative Procedure Act). HB 201 requires DNR to adopt regulations that implement section 17. Ch. 5 § 17(c), FSSLA 1994. Although section 17 requires DNR to manage trust land under provisions of law applicable to other state land, this is subject to the overriding imperative of managing mental health trust land consistent with the trust principles of the Alaska Mental Health Enabling Act of 1956. Ch. 5 § 17(a)-(b), FSSLA 1994. Any DNR regulation for the separate trust unit that conflicts with the State's trustee responsibilities under the Enabling Act will violate its statutory authority and must fail because of the supremacy of the Enabling Act. Certainly during the process of adopting the first set of regulations for trust land management, the memory of this twelve-year case will be sufficiently fresh to discourage DNR from adopting regulations adverse to the interests of the trust.

The court finds that problems previously identified as requiring legislative action have been satisfactorily resolved. Of course, the uncertainty over policies and regulations for DNR management of trust lands remains a concern.

D. Settlement Compared to Further Litigation

The most important factor in evaluating the fairness of a class settlement is a comparison between the likely result of further litigation and the remedy provided in the settlement. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981). The court must determine "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." MCL 2d § 30.44, at 242. In making this determination, a court must have a grasp of the facts and law involved as well as the possible range of damages the class could recover. In re Agent Orange, 597 F. Supp. at 760. The value of the settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." In re Agent Orange, 597 F. Supp. at 762. At the same time, the court must refrain from turning the settlement approval process into a trial. In re Agent Orange, 597 F. Supp. at 760.

1. The settlement

The HB 201 settlement provides the class with five primary benefits. The mental health lands trust will be reconstituted with some original trust lands and some replacement lands selected from among existing state lands. The Trust Authority is created with responsibility for protecting trust assets and planning and promoting the integrated comprehensive mental health program. The mental health program is given advantages in the budgeting process. The trust is given $200 million in cash. Although the lands will be managed by DNR, a special unit is created whose exclusive responsibility will be to manage trust lands.

The class will lose its claims to the lands which will not be returned to trust status.[57] It is difficult to determine the value of

[57]This statement is not true if the State materially breaches the settlement agreement. In the event of a material breach, the beneficiaries may file a new action reasserting all their claims. The beneficiaries may not be in as good a

those lands because of valuation issues. However, for discussion and comparison purposes, the parties have placed these values on the lands which are not being returned to the trust:

Table 1
Lands not returned to trust status (NRTL's)

Category	State's Value (in millions)	Plaintiffs Value (in millions)
Surface lands	443.6	$ 443.6
Mineral lands	122.7	535.4
Timber	26.4	36.5
Coal	38.6	28.9
Hydrocarbon	2.8	2.8
Total	$ 634.1	$ 1,047.2

The class will also give up any claims it may have to damages from mismanagement by the State or from a breach of trust.

The reconstituted land trust will consist of some lands which were original mental health trust lands and some substitute replacement lands. The reconstituted trust will contain a variety of lands valued for timber, coal, minerals, oil and gas, and surface uses:

Timber: Approximately 58,000 acres, including original trust lands at Cape Yakataga and Jackolof Bay and substitute lands at Thorne Bay.

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position as they are today because there may be intervening rights created which would defeat their claims. However, they will not incur any detriment from the fact they dismissed their claims with prejudice.

Coal[58]: Approximately 157,000 acres, all unleased original trust lands, located in the Matanuska Valley Moose Range, Healy and Beluga.

Minerals: Approximately 423,000 acres, including original trust lands with fee or mineral only estates in areas near Ketchikan, Juneau, Fairbanks, Healy (California Creek), and Chena Hot Springs, and substitute lands at Livengood, Cleary Summit (Ft. Knox), Ophir, Haines (mineral estate only) and Salcha (mineral estate only).

Oil & Gas: Approximately 106,000 acres, including original trust lands in the Cook Inlet region (hydrocarbon estate only) and substitute lands to replace those lost in the Cook Inlet Regional Corporation ["CIRI"] exchange adjacent to the CIRI lands.

Surface: Approximately 150,000 acres, including almost 36,000 acres in southeast Alaska, more than one-half of which is located near Ketchikan and Petersberg; approximately 52,000 acres in southcentral Alaska, over one-half of which is primarily original trust land in the Matanuska Valley, mostly in the Palmer and Wasilla area; and over 62,000 acres in interior Alaska, over half of which is located in Nenana and Anderson.

Without question, the reconstituted trust is not as valuable as the original mental health trust. Plaintiffs' most optimistic values would value the original trust lands at $1.9 billion and the reconstituted trust at $1.1 billion.[59] Plaintiffs estimate that over $900 million of the value of the reconstituted trust is from original trust lands that are being returned. See Exh. AA. Neither side places particularly large values on the substitute lands. These are

[58]None of the leased coal lands in the original trust will be returned to the trust. There was no legal impediment to their return.

[59]These numbers are both based on Chapter 66 assumptions and mineral valuation by Dr. Metz. The court believes that both are overstated values.

the approximate values for the substitute lands estimated by the parties[60]:

Table 2
Substitute Lands

Category	State Value (in millions)	Plaintiffs' Value (in millions)
Surface	$ 101.2	$ 101.2
Mineral	182.7	161+
Timber	24.7	26
Coal	.....-	-
Hydrocarbon	2.8	2.8
Total	$ 311.4	$ 291+

A large part of the difference in value between the original trust and the reconstituted trust is in surface value ($443.6 million in non-returned trust lands versus $101.2 million in substitute lands). The trust lands which are not being returned are generally lands where the State conveyed an interest to someone else. With respect to lands chiefly valued for their surface value, this includes primarily the lands now held by municipalities and third party purchasers. These were the lands originally selected as "settlement" lands, that is, the lands near urban areas that the individuals selecting the lands for the trust expected to be sold for growth and surface development. These lands were among the most desirable for immediate sale when the legislature reclassified trust lands as general grant lands. The court considers these valuation numbers to be fairly reliable and the reduction in value to be close to a real dollar loss.

The other area of significant decrease between the original trust and the reconstituted trust is in mineral value ($535.4 million in the non-returned trust lands versus $161+ million in the reconstituted trust, using plaintiffs' figures derived from Dr. Metz'

[60]The State's values are found in Exh. Z. The plaintiffs' values are the court's best estimation based on a variety of sources.

valuations). The court does not consider these valuation numbers to be reliable. The court does not believe this reduction in value is a real dollar loss.

The second benefit of the settlement is the creation of the Trust Authority. The court finds that this is a substantial benefit. Under the statute, the Trust Authority will have primary responsibility for overseeing the integrated comprehensive mental health program for Alaska and the mental health trust. The program improvements and the importance of the Trust Authority are the one thing on which all of plaintiffs' attorneys agree; these provisions were developed by interested parties in three years of work. The Trust Authority will be the trustee of the reconstituted trust. It will not manage the land or the mental health trust fund, but it will oversee the management by DNR and the Permanent Fund Corporation. The Trust Authority "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of [the Enabling Act]." HB 201 § 9 (to be codified as AS 37.14.009(a)). The Trust Authority will have the power to spend the income from the trust on the integrated comprehensive mental health program according to the intent of the parties to this agreement. See Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). The Board of Trustees of the Trust Authority is to be appointed by the governor and confirmed by the legislature after consideration of a list of persons prepared by a panel composed of individuals selected by the major advocacy groups[61] for the four core beneficiary groups, the Alaska Native Health Board and the Trust Authority. Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991. The Trust Authority must "prepare, and periodically revise and amend, a plan for an integrated comprehensive mental health program" in conjunction with the Department of Health and Social Services. Ch. 66 § 36, SLA 1991 (to be codified as AS 47.30.620(a)). It is the court's judgment that even if the reconstituted trust never earns enough money to support the mental health program, the Trust Authority

[61]The groups are: the Alaska Mental Health Board, the Governor's Council on Disabilities and Special Education, Advisory Board on Alcoholism and Drug Abuse, and the Older Alaskans Commission.

and the program changes made in the statutes should provide real improvements in the lives of the beneficiaries. For this reason, the court considers the Trust Authority with all its powers and its advocacy position to be a fundamental and significant part of this settlement.

The third benefit from the settlement lies in the budgeting advantages found in the legislation. First, the Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a). Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, if an appropriation is vetoed, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. Id. at AS 37.14.005(c).

These budgeting advantages may prove to be significant as the budget for the integrated comprehensive mental health program competes with other needs for general fund appropriations. The mental health budget is given an advantage for inclusion in the governor's budget over the budgets of other state agencies. The mental health budget is given an advantage before the legislature both from its separation from other appropriations and in the required legislative report. Clearly, there are no guarantees of adequate funding or expanded funding for necessary services, but these budget advantages may prove to be significant nonetheless.

The fourth benefit from the settlement is the payment of $200 million to the trust fund. This cash infusion is extremely significant. First, it ensures that there will be some income for the support of the Trust Authority and whatever programs it decides to

fund. Second, it is real money in hand today. In this way it is unlike the other values that are attached to the trust assets. For example, $200 million of mineral value may never produce $1 of income for the trust, because the mineral values are based on probabilities of discovery derived from extremely limited geophysical, geochemical, and geological data with no actual drilling. The results of comparing the $200 million in cash with a royalty stream are interesting. The $200 million is the equivalent of the net present value of an annual royalty stream of $254 million paid with a 10 year start-up delay and a 20% discount rate over the 20 year average life of a mine. It would take $6.3 billion in metallic mineral production each year from these lands to generate that royalty stream.[62] The $200 million is also more valuable than $200 million value in surface estate lands. To compare those two values one must apply an absorption rate and a discount rate to the surface value. Doing so could reduce the surface values to as much as one-tenth to one-fifth of their stated value, thus $200 million surface value in lands may be the equivalent of $20 - 40 million cash in hand.

The fifth benefit of the settlement is the creation of a special unit in DNR whose sole job will be to manage the reconstituted trust lands.[63] The court considers the addition of a special unit to manage these lands to be an improvement over general management by DNR for several reasons. First, the land managers in the special unit will have a smaller amount of land per person to manage than those in DNR. This should allow managers to be proactive managers instead of passive managers. Second, the special unit members can be trained in the special rules applicable to trust management and will have to apply only those rules and those laws applicable to other state lands which do not

[62]This example uses a 4% net smelter return royalty. The entire annual metallic mineral production of the United States is $11 billion. If you assume no time delay and use a 10% discount rate, the necessary annual royalty payment would be $23.5 million.

[63]Although listed as a settlement benefit, this provision of HB 201 remains effective even if the settlement fails. ~~See~~ HB 201 §§ 17, 18, 22, and 52. It is listed as a settlement benefit because it may not be achieved through litigation, if the non-settlement provisions of HB 201 are held invalid.

conflict with trust management under the Enabling Act. Third, the individuals in the special unit may develop a sense of pride in their special charge.[64]

There are two advantages to settlement not found in the statutes. First, the involvement of the environmental and resource industry interest groups in the negotiation process should assist the trust's development of its lands for income purposes. Where people are involved in the development of a settlement, they are less likely to attack it.[65] Additionally, there should be fewer challenges to the trust's attempts to develop the land because of the agreement of affected parties to the inclusion of the lands in the reconstituted trust. Second, settlement is advantageous because it eliminates the delay that would result from litigation and the cost of further litigation. This case would take years to try, even with the concerted efforts of all participants.[66] The court would have to determine individually whether over 5,000 third party purchasers were bona fide purchasers. The court would have to adjudicate claims to lands given to municipalities, placed in legislatively designated areas, used by state agencies and exchanged for other lands. The court would have to litigate the extent of the setoff for state expenditures, examining hundreds of appropriations and grants. The court would have to litigate the plaintiffs' claim for lost opportunity damages due to mismanagement of the trust. The delay would be years and the cost to the state would easily be in the millions of dollars. Merely avoiding delay is never a sufficient reason to approve a settlement; it is essential not to "substitute one hour of efficiency for one moment of justice." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1223 (5th Cir. 1978),

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[64]Mr. Erickson described disadvantages he expected from the way in which the special unit is set up with all employees in the "partially exempt" classification. The court disagrees with Mr. Erickson and expects more good than bad to result from the creation of the special unit.

[65]The Chapter 66 experience taught all this lesson. Chapter 66 was attacked by both the public interest and oil company intervenors. Those attacks delayed implementation of and weakened the Chapter 66 settlement.

[66]This is not true if the non-settlement provisions of HB 201 are valid. However, in that case, the appeal from this court's decision could take several years.

cert. denied, 439 U.S. 1115, 59 L.Ed.2d 74 (1979). However, delay in this case is costly for the trust. Every year of litigation is time wasted for the development of trust assets so that they can produce income for the beneficiaries' interest.

2. Litigation

The actual results of litigation are impossible to predict and it would not be proper for the court to actually rule on contested issues. However, it is necessary to analyze the litigation risks present. That is, the court must analyze the strengths and weaknesses of the plaintiffs' case. If plaintiffs won on every issue, the result would be the reconstitution of the trust with all of the original mental health trust lands. The State would either not be able to apply a setoff for state expenditures on the mental health program or the setoff would be neutralized by plaintiffs' claims based on mismanagement of the trust. The trust lands would be managed by DNR, unless the plaintiffs succeeded in removing the State as trustee.[67] There would be no Trust Authority and no program improvements. If the plaintiffs were extremely successful, there might be some cash for the trust from their lost opportunity claims based on mismanagement of the trust. This "best-case" scenario is not very likely. There are significant litigation risks from (a) the non-settlement provisions of HB 201, (b) the determination that some lands are "sold", (c) the application of the setoff for state expenditure on the mental health program, (d) the difficulties of proof of the lost opportunity claim, and (e) problems with the valuation of mineral lands. The court will discuss each of these risks.

a. Non-settlement provisions of HB 201

If this case is not dismissed by December 15, 1994, the portions of HB 201 that will be effective would accomplish a legislative reconstitution of the trust with the same lands included in the settlement. The Trust Authority, program improvements, and budget advantages would not be enacted. The $200 million would

[67]The court does not believe this is very likely.

not be appropriated to the trust. Obviously, if HB 201 is valid, the class is much better off with this settlement.

The State defends the non-settlement provisions of HB 201 under the doctrine of "curative legislation." Weiss and AMHA argue that the statute does not meet the test for curative legislation.

The Alaska Supreme Court has adopted this definition of a curative statute:

> a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.

Fairbanks North Star Borough v. State, 753 P.2d 1158, 1160 (Alaska 1988), quoting 2 C. Sands, Sutherland Statutory Construction § 41.11 (4th ed. 1973). Legislation must meet a two-pronged test in order to be considered curative of previously enacted invalid legislation:

> (1) the legislature originally must have had the power to authorize the acts done, and
>
> (2) there is no unconstitutional impairment of vested rights as a result of the act's passage.

Fairbanks North Star Borough v. State, 753 P.2d at 1160. If a statute qualifies as a valid curative statute, it is given retroactive effect. Fairbanks North Star Borough v. State, 753 P.2d at 1160. Therefore, actions rendered void prior to passage of the curative statute are legitimized. Id.

It is fairly likely that the State could show that the legislature would have had the power to enact the non-settlement provisions of HB 201 at the time of the 1978 redesignation

legislation. It is clear from State v. Weiss, 706 P.2d at 683-84 that the legislature did not have the power to terminate this trust. However, HB 201 does not terminate the trust; it exchanges some substitute land for trust land and "sells" some land for the benefit of the mental health program, and it applies the setoff for money spent on the mental health program to the proceeds of the sale. The Alaska Supreme Court permitted the State to dispose of land from the university lands trust, as long as the university lands trust was compensated for the appraised value of the disposed land. State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981). However, that case involved the redesignation of 5,040 acres of university trust land of a total 100,000 acre trust for park designation. The difference between University of Alaska and this case was primarily one of degree. The court in Weiss stated:

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

State v. Weiss, 706 P.2d at 684. Under the Enabling Act, the State was given the power to exchange and sell trust lands for the benefit

of the beneficiaries. Section 202(e) of the Enabling Act provides, in part:

> Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska.

The court concludes that the State would have greater difficulty establishing the second prong. Nevertheless there is a significant litigation risk associated with the non-settlement provisions of HB 201.

b. "Sold" lands

Under the Supreme Court's guidance in Weiss, the State must reimburse the trust for the fair market value of lands "sold" after the 1978 redesignation legislation. Weiss, 706 P.2d at 684. However, the State is allowed a setoff for "mental health expenditures" from the date of the redesignation legislation to the date of the "sale." Id. If expenditures exceed the fair market value of the lands sold, the State need not furnish cash as part of the reconstitution. Id. Thus, it is in the interests of the class to exclude lands from the category of "sold" lands, and it is in the interest of the State to include lands within the "sold" category.

The Supreme Court expressly did not reach the issue which AMHA attempted to raise on appeal, viz. whether lands could be returned to the trust if the purchaser was not a bona fide purchaser. Weiss, 706 P.2d at 684 n.4.

There are several categories of land at risk of loss to the trust without compensation: pre-1978 disposals, land held by third party purchasers, municipality entitlements, classification to legislatively designated areas (LDA's), lands used by other state agencies, and lands exchanged with the Cook Inlet regional

corporation ["CIRI"]. The leased coal lands at Healy and Beluga are not in these classes. If the case was litigated, those leased coal lands would clearly return to the trust.[68]

The court concludes that the litigation risk associated with the pre-redesignation legislation disposals is very high. Nothing in Weiss would require that they be included in the reconstituted trust. To mandate their return, the plaintiffs would have to prove a breach of trust or other invalidity other than the enactment of the redesignation legislation. It is not likely that the plaintiffs could do so, in light of the power of the legislature to sell the trust lands and the court's decision in University of Alaska.

These pre-1978 disposals encompass a significant amount of land and land value. Before the redesignation legislation, the State had disposed of 19,590 acres of original trust land in sales to individuals and 164,386 acres of original trust land to LDA's. Exh. 12, at 2b. The Chena Recreation Area outside Fairbanks was the recipient of much of the acreage lost to LDA's. The plaintiffs' estimate that as much as one-eighth of the value of the original trust lands, $237.5 million, is in the Chena Recreation Area.

The second category of land which may be lost is that sold to third party purchasers. It would be difficult for the plaintiffs to argue that the land was not "sold." The question would be whether the bona fide purchaser doctrine applied, and if so, whether the plaintiffs could obtain the land from purchasers because they were not bona fide purchasers. The plaintiffs' claim that the bona fide purchaser doctrine should be applied is a strong one. It is a doctrine normally applied to property purchased where the trustee breached the trust by selling trust property. See Restatement (Second) Trusts § 284 (1959). Weiss implies that basic trust principles should be applied to this trust. See State v. Weiss, 706 P.2d at 683 and n.3. However, the litigation risk associated with recovering this property is very high because most of the

[68]The loss of these coal lands is significant. They are the only coal lands currently in production. They generate approximately $1 million per year in royalties.

purchasers probably were bona fide purchasers. The trust would only recover the property if the purchaser bought the property with knowledge of the breach of trust.[69] It is likely that most purchasers before 1985 did not know that the State had breached its fiduciary obligations to the trust. Few people even knew there was a mental health lands trust before this litigation was filed in 1982. The third party purchasers may have other defenses as well such as the statute of limitations, waiver, and the lis pendens expungement before the appeal.

The value associated with land conveyed to third party purchasers is significant. Ms. Hayes stated that the plaintiffs valued these lands at $154.6 million. The chance of recovering any significant portion of those lands is low.

The third category which may be lost is land that was conveyed to municipalities as part of the municipal entitlement program.[70] Plaintiffs claim that this land was not really sold, it was given away with no expectation of payment. The State argues that it was sold just as the lands designated for Chugach State Park were sold in University of Alaska. Even if the plaintiffs prevail on whether the land was sold, they face a major obstacle in obtaining the lands since many of the lands have been sold by the municipalities to individuals, some of whom are likely to be bona fide purchasers.

The court assesses the litigation risk for the municipal conveyance as medium. The value was given by Ms. Hayes as $188.1 million.

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[69]Sometimes property can be recovered from those who should have known of the breach of trust. ~~See~~ Restatement (Second) Trusts § 297 (1959). Plaintiffs have also asserted that if the sale was for less than fair market value, the trust should recover the land. This basis for recovery is more tenuous in light of the history of state sales at less than fair market values.

[70]Each municipality was allowed to select a specified number of acres of state land within its boundaries. ~~See~~ AS 29.65. Municipalities were permitted to select mental health trust land until the October 4, 1985. AS 29.65.060. On October 4, 1985 the Alaska Supreme Court issued the ~~Weiss~~ decision.

The fourth category of land which may be lost is the LDA land, that is, land which has been set aside by the legislature for other uses such as parks. The plaintiffs claim that the land was not sold. The State asserts its right to designate the trust land as recognized in University of Alaska.

The litigation risk associated with these lands is high in light of University of Alaska. The mineral value of these lands determined by Dr. Metz was $534.9 million.[71] See Exh. V, at 23 (Table 3).

The fifth category of land which may be lost is the land used by other state agencies. The plaintiffs argue the land has not been sold. The State probably argues that the trust land is like condemned land.

The court assesses the litigation risk as high. The value of the land has been estimated at $15 million.

The sixth category of land which may be lost is the land which was exchanged with CIRI. This exchange was approved by legislation in the United States Congress. Accordingly, it could be appropriate to regard the land as taken away by Congress and thus lost. The plaintiffs argue that the trust should receive the land that was exchanged for this land.[72] The State may argue that Congress did not intend for the exchanged lands to be included in the trust since the conveyance did not specifically mention the mental health trust.

The court considers the litigation risk associated with the exchanged lands to be fairly low and the risk associated with return of the original lands to be extremely high. The plaintiffs have valued the CIRI lands at $45.5 million.

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[71]This figure includes the Chena Recreation Area, discussed above. Excluding that area, the value is around $300 million.

[72]~~Weiss~~ provided that where exchanges are made, "the properties which can be traced to an exchange" will be included in the trust. ~~Weiss~~, 706 P.2d at 684.

There are significant litigation risks associated with several categories of land. The amounts at risk, as estimated by the plaintiffs, is shown below.

Table 3
Litigation Risks

Land Category	Litigation Risk	Value (in millions)
Pre-1978 lands	Very high	$237.5+
Third party purchasers	Very high	154.6
Municipal conveyances	Medium	188.1
LDA's	High	300
State agencies	High	15
CIRI (exchanged lands)	Low	45.5
	Total	$940.7

c. Setoff

The setoff for state expenditures for the mental health program presents a very significant litigation risk. The setoff has the potential to negate any cash recovery to the trust resulting from the State's obligation to pay for "sold" lands.

The plaintiffs disagree that the State should be able to apply a setoff in this way and assert that the Supreme Court's statement in Weiss was the result of mismanagement by then-class counsel.

The litigation risk associated with winning this claim at trial is very high. First, the Alaska Supreme Court has already stated that the setoff is to be applied. Second, it is very unlikely that the ruling would be reviewed by the United States Supreme Court. Third, there are sound arguments that favor the setoff. Section 202(e) of the Enabling Act appears to allow the proceeds of sales to be used for the necessary expenses of the mental health program.

If the setoff is applied, its impact would likely be substantial. The court has no evidence of the size of the setoff. The legislature found that "state mental health expenditures have totaled more than $1,300,000,000" since 1978. HB 201 § 1(18). Even if this sum is reduced because of overinclusion of expenses and overinclusion of years,[73] it has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been "sold."

d. Lost opportunity claim

Weiss and AMHA maintain that the plaintiffs' claim for lost opportunity damages due to the State's mismanagement of the trust would more than nullify the setoff for state expenditures. There has been no discovery done on this issue. There has been no attempt to litigate the issue. This claim has largely been relegated to an occasional whisper from the back of the courtroom; this claim has never played a central role in anyone's analysis of the case until the hearing on final approval.[74]

There are significant risks associated with the lost opportunity claim. The court believes that it is very likely that the plaintiffs could prove that the State mismanaged the trust. The State did not treat these lands differently from other state lands even before the redesignation legislation. DNR did not manage the lands proactively to produce income for the trust. The State did not even maintain separate accounting for trust revenues. The

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[73]The Supreme Court's guidance appears to limit the setoff to amounts spent from 1978 to the date of the "sales." That would limit expenditures to the period from 1978-85 for most "sold" lands.

[74]For example, the proponents of the Chapter 66 settlement agreement had only this to say about this claim in their informational booklet for the class:

> The Plaintiffs also argue that before taking the setoff the court should consider what the trust should have earned if it had been properly managed. Even if Plaintiffs were able to establish the principle, it would be very difficult to prove what should have been earned.

~~Preliminary Report on Proposed Settlement of the Mental Health Trust Lands Litigation (Chapter 66 SLA 1991)~~, at 42 (1991).

difficulties with the claim stem from the difficulty of proving damages and the potential for the assertion of legal defenses.

Lost opportunity damages are difficult to prove in the any case unless there is an existing history of business activity or earnings. They would be extremely difficult to prove in this case.

The most difficult area of proof concerns the mineral lands. Almost nothing is actually known about the mineral producing capacities of these lands. The lands were open for mineral development and staking for free from the time they were in state control until after the Supreme Court's decision in Weiss. Accordingly, the proof would center on what would have happened with proactive promotion of the lands. However, there is no appropriate comparative standard. Throughout this period no group in this state actively promoted mineral lands. Thus, it is hard to predict how the mineral industry would have reacted to active management. Even if the plaintiffs overcome this hurdle, they would have to prove how much money they would have earned from producing mines. Alaska has not had a very active metallic mineral industry, other than for the production of gold. There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing.

The easiest area to prove, lost opportunity damages concerning the surface lands, still poses litigation risks. There are proof problems there as well. The years from 1966 (when selections were largely completed) to 1978 were growth years for the state, but most of the growth occurred in the latter part of that period with the building of the Transalaska pipeline. The plaintiffs could have difficulty showing a market for lands before 1975. The plaintiffs could also have difficulty from absorption rate[75] analysis.

The claims are also subject to legal defenses. The State could probably defeat some of these claims by the statute of limitations. The State could probably defeat most claims after 1986

[75]The absorption rate is the amount of time it takes the market to absorb a portfolio of property offered at one time.

based on waiver.[76] The State could also assert that any claims in excess of the setoff are barred by the lateness of the assertion of the claims and the limitations placed by the court on the intervention by AMHA.[77] The potential defenses put some if not all of the potential damages from the lost opportunity claim at risk.

e. Valuation issues

The bulk of the values given by the plaintiffs is derived from mineral lands. The $2.2 billion value for original trust lands derived from procedures approved by the Interim Mental Health Trust Commission contained a $1.5 billion component for mineralized lands. The $1.9 billion value attributed to the original trust lands under the Chapter 66 process contained a $1.3 billion component for mineralized lands. The $1.0 billion value by plaintiffs for the original lands not returned to the trust under this settlement contains a $535 million value for mineralized lands. In litigation, the plaintiffs would have to prove the value of lands deemed "sold" to be able to recover any damages. There are very significant litigation risks associated with proving the numbers stated. In fact, after extensive evidence on the issue at the final approval hearing, the court believes that the plaintiffs' valuations significantly overstate the value of the mineralized lands.

The plaintiffs' values for the mineralized land derive from valuations reached by Dr. Paul Metz in reports completed in 1988 and 1994. The two valuations are based on the same methodology and assumptions. In the 1994 report, Dr. Metz performed additional work by forming mining models to demonstrate economic

[76]Around 1986 or 1987, the Interim Mental Health Trust Commission functioned as substitute trustee for the lands. Many of the transactions involving the lands were agreed to or not objected to by plaintiffs. Since 1990, at the plaintiffs urging, there has been a preliminary injunction ~~precluding~~ the State from taking or permitting any activity on the original trust lands without court approval.

[77]The lost opportunity claims were not asserted in the original complaint in this case. They were added in 1986 when AMHA filed its complaint in intervention. The court limited AMHA to issues affecting the reconstitution of the trust. An independent claim for damages may exceed that limitation.

viability of his posited mineral deposits and he changed the purchase price of the ore in conformity with historical market prices.

It is necessary to conduct extensive drilling on site to know whether land actually contains economically minable mineral deposits. Even with such drilling, the risks associated with metallic mineral development are such that mines developed with billion dollar investments turn out not to be profitable and are abandoned.

There is virtually no actual drilling information on the original mental health lands. As a result, Dr. Metz performed a probabalistic estimate of expected value.[78] Dr. Metz relied on a report prepared by the Alaska Division of Geological and Geophysical Survey ["ADGGS"] regarding original trust lands. ADGGS examined the known literature about the area of mental health trust lands by 1:250,000 scale quadrangle. They rated areas on a scale of one to five for low to high potential for the existence of a mineral deposit. They identified 21 mineral deposit models expected to occur in the trust lands.

Dr. Metz also relied on the United States Geological Survey ["USGS"] appraisal of Alaska mineral resources prepared for consideration of the Alaska National Interest Lands Conservation Act. These "Open-File Reports" also involved several USGS experts reviewing the literature and estimating the number of mineral occurrences in the area at the 10th, 50th and 90th percentile levels of confidence.

Dr. Metz developed geological models based on the models of Cox and Singer[79] to replace the ADGGS models. In doing so he chose the 90th percentile tonnage and 90th percentile grade from the tonnage and grade curves provided by Cox and Singer.

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[78]This methodology is an accepted method to derive the expected value of unknown and unexplored reserves.

[79]Cox and Singer are the authors of ~~Mineral Deposit Models~~, a USGS Survey Bulletin.

None of this information allows one to predict the probability of occurrence. To develop probabilities Dr. Metz relied on three more studies: Charles River Associates, Koulomzine and Dagenais, and Bailey. From this information he assigned probabilities of discovery that on a per acre basis range from one acre in one million acres (1 in $1x10^6$) to one in 30 million acres (1 in $3x10^5$).

In the 1988 report, Dr. Metz developed his estimates of the net present value of an expected royalty stream from those calculations. He used a 4% net smelter return royalty[80] ["4% NSR"]. He assumed a 10% discount rate. He made several assumptions, including that the expected mine life for all models was twenty years, that the beneficial products in the ore would almost cover all smelting costs, and that the value should be calculated as if the mines were producing today, i.e., no delay for discovery, exploration or start-up.

The court heard several attacks on Dr. Metz's methodology and assumptions at the final approval hearing. The State presented testimony from Samuel Smith, the chief of the mine permitting section of DNR. H.L. presented testimony from three experts working with the firm of Behre Dohlbear & Company, Inc., mineral industry consultants located in Denver: Bernard Guarnera, the president and chief operating officer, Thomas Houseman, a financial expert, and Robert Cameron, a geostatistician.

Mr. Smith analyzed Dr. Metz' 1988 report. He took issue with several aspects of the report. Mr. Smith criticized the report on five points: the NSR values, the tonnage ore reserve, the mine life and commodity prices, and the time to discover and develop a mine. Correcting for the first four areas of disagreement reduced Dr. Metz' 1988 value for the mineral lands not being returned to trust status from $622 million to $129.5 million.[81] Applying a five-

[80]Current state leases call for a 3% net proceeds income royalty rate which is smaller than a 4% NSR.

[81]Dr. Metz' 1994 value for mineralized NRTL's is $535.4 million.

year delay in receiving revenues and a 10% discount rate reduces the value to $80 - $90 million.

Mr. Guarnera testified that Behre Dohlbear identified four basic problems with Dr. Metz' 1994 report: (1) stacking of deposits,[82] (2) disregard of costs for smelting, refining, and treatment,[83] (3) disregard of the necessary development time once a deposit is found,[84] and (4) the use of an improper discount rate. According to Mr. Guarnera, the mineral value of the original mental health lands would be reduced from $1.3 billion to $522 million if the stacking problem were corrected; that number would be reduced to $441 million if the proper smelting charges were used; that number would be reduced to $170 million if a 10-year development time was used. Applying the correction for stacking to the NRTL's yields a revised value of $245 million; that number is reduced to $94 million if a 10-year development time is used.

Mr. Guarnera opined that Dr. Metz' values were unrealistic. The models posited by Dr. Metz would yield more zinc, lead and silver on these one million acres than is produced in the entire United States.[85] The valuation, if true, would require $4.4 billion of annual metallic mineral production from these lands. The entire United States has $11 billion in annual metallic mineral production. There was $277 million in metallic mineral production in all of Alaska in 1989. If the predictions of the report were

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[82]Where there was a possibility a parcel could contain more than one mineral deposit model, Dr. Metz added each one to obtain the expected value of the parcel. Behre Dohlbear opined that some of the deposits could not appear together for geological reasons; Dr. Metz disagreed. Behre Dohlbear also recommended using only the most likely model or assigning a pro rata value.

[83]Dr. Metz used 1% of the gross revenue as the smelting costs despite wide variability in such costs based on the type of ore. Dr. Metz defended his actions by relying on an assumption that the non-accounted-for minerals produced would pay for the increased smelting charges.

[84]Behre Dohlbear pointed out that mines are made not found. They recommended a 10-year development time as realistic.

[85]The projections would yield three times current United States zinc production, 1.5 times current lead production, and 1.3 times current silver production.

realized, 17 world class deposits would be located and mined on these lands.[86]

Thomas Houseman testified that Dr. Metz' use of a 10% discount rate is unrealistic based on industry experience with hurdle rates. He testified that a 10% discount rate would not be used even at a final feasibility stage after extensive drilling and exploration work. He stated that applying a 20% discount rate to the $1.3 billion value for original trust lands without any other adjustments would decrease the value to $738 million. If a 10-year development period was added, the value would be further reduced to $119 million. He opined that "expected value" is not real value and reliance on expected value can lead to unrealistic expectations.

Robert Cameron criticized two aspects of Dr. Metz' methodology. First, he disagreed with Dr. Metz' assessment and assumption that the Charles River Associates study presents expectations for the discovery of world class deposits. According to Mr. Cameron the study's expectations are of mineral occurrence of no size, quality or quantity. The expected value list used by Dr. Metz is roughly equivalent to grade/tonnage of the 50% percentile, not the 90th percentile. However, Dr. Metz used the data to predict deposits in the upper 10% of both grade and tonnage. Second, Mr. Cameron opined that Dr. Metz' stacking of mineral deposits increased the possibility of any one of the mineral occurrences occurring on a particular parcel. The net result of these errors is to overstate the probability that the posited mineral deposit will be found on trust lands.

These criticisms of the valuation of mineralized lands made sense to the court. There is very high litigation risk associated with proving a value for the mineralized lands deemed "sold" anywhere close to that contained in the report. The court concludes that the

[86]Dr. Metz defends his analysis by pointing out that our knowledge of plate tectonics would predict very large concentrations of metallic minerals in Alaska. He also points to the known world class deposits in Alaska associated with the Red Dog mine, the Alaska Juneau gold mine, the Quartz Hill molybdenum deposit, the placer gold deposits in Fairbanks and Nome, and the Kennicott copper mine near McCarthy.

mineral values derived by Dr. Metz overstate the true value of the mineral lands. The risk is that trial would result in a finding of gross overstatement.

The unreliability of the valuation when compared to real value is an important consideration in evaluating this settlement in another respect as well. Some class members have been outraged that the trust is not being made whole, which they define as $2.2 or $1.9 billion of value. The court is confident that those are not real or reliable numbers. It is unlikely that the original trust lands could ever produce revenues approaching those that have been predicted. More importantly, given the lack of real knowledge about the lands that exists today, the number does not represent the fair market value of the lands. The valuations given by Dr. Metz are useful when comparing two groups of mineralized land, but they do not compare with real money or with more reliable estimates of value.

3. Comparison of the likely results of litigation with settlement.

One approach for comparing the likely results of litigation with the settlement is to look at comparisons of value for the most likely results from litigation with the settlement. It is essential in making this comparison that the same assumptions for value are used throughout, accordingly, the court will use plaintiffs' values derived under Chapter 66 procedures. The value of the original trust lands under these assumptions is $1.9 billion; the value of the reconstituted trust lands is $1.1 billion.

If the case went to trial, it is not likely that all lands would be returned to the trust. The probable results range from a low value where the plaintiffs only succeeded in returning the municipal conveyances and the CIRI exchange lands and unencumbered lands to an optimistic value where plaintiffs were highly successful and lost only the pre-1978 land conveyances and 80% of the third party purchases. The low value of the reconstituted trust lands would be:

MRTL's (returned original lands) $929 million (see Exh. AA)

Plus: CIRI exchange	45.5
Municipal conveyances	188.1
	$1,162.6 million

The high value of the reconstituted trust lands would be:

Total original trust lands	$1,900 million
Minus: Pre-1978 conveyances	237.5
80% Third party purchasers	123.7
Total	$1,538.8 million

It is the court's judgment that it is not likely that the trust would receive any cash component at litigation because the permitted setoff for state expenditures would exceed the value of "sold" lands, even when tempered by plaintiffs' lost opportunity claim. Accordingly, plaintiffs' entire benefit from litigation would be a reconstituted trust worth between $1.2 billion and $1.5 billion. There would be no Trust Authority, no program improvements, and no budget advantages.

The settlement would yield $1.1 billion in reconstituted lands, $200 million in cash, the Trust Authority, program improvements, and budget advantages. When viewed in this light the settlement appears fair, adequate, and reasonable.

Another approach to comparing the results of the litigation with the settlement is to compare the value of the non-returned trust lands (NRTL's) with the substitute lands, the cash, and the other benefits. This approach deletes the original trust lands that are being returned from both sides of the equation. The parties' values for the NRTL's is given in Table 1 at page 62 and for the substitute lands in Table 2 at page 64. The following chart illustrates the difference in value between the NRTL's and the substitute lands ["PSL's"]:

Table 4
Difference NRTL's - PSL's

State Values	Plaintiffs Values

	(in millions)	(in millions)
Surface	$342.4	$342.4
Minerals	<60>	374.4
Timber	1.7	10.5
Coal	38.6	28.9
Hydrocarbon	0	0
Total	$322.7 million	$756.2 million

According to believable testimony at the final approval hearing, the $200 million in cash is the equivalent of the $340+ million in lost surface value when considering a ten-year absorption rate for the property, a 5% appreciation rate, and a 16% discount rate. Thus, the difference between the non-returned trust lands and the settlement is primarily the loss of the Healy and Beluga leased coal lands and an uncertain amount of mineral value. The court considers this to be a reasonable and adequate trade considering the uncertainty and likely overstatement of the mineral valuation, the importance of the litigation risks, the value of the Trust Authority and program improvements, and the budget advantages from the settlement.[87]

A third approach to comparing the results of litigation with the settlement is to compare the two if the non-settlement provisions of HB 201 are valid. In this situation the comparison is clear: the class is better off with the settlement. If the non-settlement provisions of HB 201 are valid, the result of further litigation is certain. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: $200 million, the Trust Authority, the program improvements and the budget advantages.

[87]The court has difficulty calling the exclusion of the Healy and Beluga leased coal lands "fair." There was no legal impediment to their return. If the legislature reclassified them outside the settlement it would probably constitute a breach of trust. Approval of this settlement would have been a more satisfying result if those lands had been included in the reconstituted trust.

In summary, regardless of the approach used, the court concludes that when comparing the likely result of litigation with the settlement, the settlement is fair, adequate and reasonable.

Settlement is usually preferable to lengthy and expensive litigation with uncertain results. Newberg on Class Actions, § 11.50, at 11-122. Although liability of the State has been established in this case, much uncertainty remains with regard to the amount and type of relief. Land valuation has been a major point of disagreement between the parties since settlement discussions began. An additional parade of experts testifying about the mineral values and other land resource values will add more to the cost of litigation than to the useful information on which to base the reconstitution of the trust.

The outcome of litigation of third party titles is far from certain. Such litigation is likely to involve the complication of defendant classes composed of the holders of third party titles. This would add greatly to the expense, duration, and complexity of this litigation and directly involve a large number of holders of small parcels. At the same time there would be little or no benefit for the class, when compared to the present settlement proposal, because of the setoff for the State's past mental health expenditures.

The court concludes that the added cost in time and money of further litigation in this case cannot be justified by the probable outcome of litigation. The plaintiffs suffer from delay because they are prevented from benefitting from the program improvements and the trust lands lie idle. There is benefit to putting this litigation to rest with a reasonable, though not ideal, settlement.

E. Reaction of the Class to the Settlement

Generally, if some class members or their counsel raise cogent objections, a court must be concerned that the case may have been settled with too little regard for the interests of the class as a whole. MCL 2d § 30.41, at 237. Substantial objections to a proposed settlement require a detailed response from the proponents. MCL 2d § 30.42, at 238. At the same time, a lack of

objections or comments from the class is not always an indication of fairness. In complex cases such as this one, "when the majority of absent class members are usually unrepresented by counsel and possess insufficient knowledge to evaluate the fairness of the settlement," a court should not make an inference of fairness based on silence or a low number of objections from class members. Newberg on Class Actions § 11.48, at 11-117. A court always has a responsibility to analyze the settlement independently and intelligently and comments from the class are one factor in that analysis. Id. In addition, this court has a greater responsibility here than in most cases, due to the unsophisticated nature of most class members. Although relatively few class members commented on the settlement, the court does not presume that all of those not commenting support the settlement. In fact, it is reasonable to assume that the same ratio of supporters and objectors exists among the silent class members and families as exists among those who submitted comments to the court.

Comments from a (b)(2) class are intended to alert the court to problems in the settlement such as potential conflicts between portions of the class. Comments from a class such as this one should not be treated as votes, although tabulation of the number of class members expressing particular opinions can be useful to the court in recognizing trends in evaluation of the settlement by class members.

Often the opinions of the named representatives of the class are of particular value to a court because the named representatives usually have a greater involvement in the case than other class members. In this particular case, the families of class members and other class advocates appear to have been at least as involved as the named representatives. One family member, Vern Weiss, is named in this case because his son, Carl Weiss, was a minor when he was named one of the original representative of the class. Mr. Weiss strongly opposes the settlement.[88] Final Hearing

[88]Earl Hilliker, another original named class member, sent a written comment opposing the settlement, but his oral comments left the court uncertain about his opinion of the settlement. Final Hearing (Nov. 2, 1994).

(Nov. 2, 1994). John Malone, a family member who has been closely involved with this case for several years supports the settlement, primarily because he believes the Trust Authority could be an effective advocate for beneficiaries. Final Hearing (Nov. 2, 1994). Other named representatives typically aligned with the viewpoint of the attorney who represents them.

1. Written comments

A post office box was rented by the court for the receipt of class comments. Individuals from the Department of Law in Fairbanks monitored the box and stamped each comment with the date received. Each comment was given a sequential number and copies were sent to class counsel at least once per week. The original comments were transferred daily to the court.

Approximately eleven hundred (1,088) written comments were received from a variety of locations in Alaska, including Barrow, Homer, Ketchikan, Anchorage, Fairbanks, and Juneau. Nearly four hundred comments were from class members, family members of class members, beneficiary advocacy groups, or guardians of class members.[89] Over 150 of these were from class members. Approximately 80 were received from mental health advocacy groups[90] or people indicating they work in the mental health field.

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[89]The court included among beneficiaries/class members the few commentators who described themselves as suffering from a mental illness or chronic alcoholism even though on the form they marked the box for "member of the public." A similar approach was taken for all other categories of commentators because some clearly did not understand the categories.

[90]Organizations, boards, and commissions which submitted written comments in favor of settlement approval included the Alaska Addiction Rehabilitation Services (named party), Alaska Alliance for the Mentally Ill, Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, the Juneau Alliance for the Mentally Ill, the Ketchikan Alliance for the Mentally Ill, and the Older Alaskans Commission. The Alzheimer's Association recommended approval, but had several specific reservations about the settlement. The organizations submitting written comments in opposition to the settlement included the Alaska Mental Health Association (named party), the Anchorage

Because many members of the class may not be able to understand the notice or speak for themselves, comments from family members, guardians, advocacy groups, mental health professionals, and others working directly with trust beneficiaries were all considered together as comments from the class. Therefore, approximately forty percent of all written comments received were considered class comments.

A total of 47 purchasers of original trust land sent comments to the court. A few purchasers of trust land marked "beneficiary" on the comment form, but were clearly concerned exclusively with obtaining clear title or monetary compensation for problems caused by their clouded title.[91] The interests of purchasers of original trust land are directly adverse to those of the class and, therefore, were excluded from comments categorized as class comments.[92]

Comments from the general public who indicated no connection with the mental health community also were not categorized as comments from the class.[93]

The court read every comment received by October 21, 1994, including those from the general public and purchasers of

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Alliance for the Mentally Ill, the Fairbanks Alliance for the Mentally Ill, the Kenai Alliance for the Mentally Ill, and the Mental Health Consumers of Alaska.

[91]These purchasers appeared to mistakenly consider themselves "beneficiaries" of the trust or the settlement because they had purchased trust land.

[92]Naturally, virtually all purchasers of trust land favor approval of the settlement in order to clear title to their land. If this case went to trial, such purchasers would be defendants in this case. It would be inappropriate for the court to give the comments of purchasers the same weight as the class comments.

[93]The court rejects the State's suggestion that every resident of Alaska is a class member. Carried to an extreme, the same could be said of all United States residents, because they might move to Alaska and later require mental health services. While it is true that any person theoretically could need mental health services in the future, most Alaska residents do not have sufficient experience with mental health services to enable them to comment as class members or their representatives. Moreover, unless people perceive themselves as potential beneficiaries, it is unlikely that they would identify with the beneficiaries' interest in the settlement.

trust land. However, the court's consideration of the comments was weighted according to whether or not it was categorized as a class comment.

Counsel for H.L. urged separate consideration of comments from the general public, arguing that the court should consider the "public interest" and the fairness of the settlement to all persons affected by it. Proponents' Memorandum Re: Class Comments, at 5-6 (Nov. 14, 1994). Notice was certainly broad enough to give all persons who might be affected by this settlement, including purchasers of original trust land, an opportunity to bring their concerns to the court's attention. However, comments from individual members of the public are not necessarily the same as the "public interest." In the present case, the public comments were a diverse and often conflicting mixture of concerns including enforcement of the trust, society's responsibility to care for the mentally ill and retarded, the cloud on state and private land titles, economic development, and moving public money and energy to other issues. Although this settlement must be consistent with the Enabling Act, the court concludes that the "public interest" is not an independent factor for analysis. The court must give full consideration to the views of class members and their representatives in light of the court's fiduciary duty to act as guardian of the interests of the class. Welsch v. Gardebring, 667 F. Supp. 1284, 1295 (D. Minn. 1987). Therefore, the court gave little weight to public comments as compared to the weight given to class comments.

Mr. Gottstein and Mr. Walker expressed concern that some people submitting written comments might falsely claim to be beneficiaries or to have family members who were beneficiaries. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court believes there are few people who would claim to be mentally ill or to have a mentally ill family member unless the claim was true. A review of written comments shows there is a greater likelihood for some class members to have indicated they were members of the public, not realizing or not wanting to admit

they qualified as members of the class.[94] In addition, at the final hearing the court observed that the overall ratio of class comments for and against the settlement was approximately the same as the ratio for written class comments.[95]

Mr. Gottstein and Mr. Walker requested that class membership or representation of a class member be verified prior to acceptance of a comment as one from the class. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court has rejected this suggestion. Verification would be impossible in some instances and would raise privacy issues.

The court finds the concerns about an overinclusive method of notice to be misplaced.[96] Comments were sought from this class to obtain a sense of how class members or their representatives viewed the proposed settlement. Contrary to the misconceptions of Mr. Gottstein, Mr. Walker, and a few individuals who submitted comment forms, the court does not view the comments as a vote which would determine the court's decision. The reaction of the class to the settlement proposal is only one of several factors the court must consider in its decision regarding whether to grant final approval.[97]

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[94]Indeed, among the forms counted as class comments by the court were those marked "member of the public" where the commentators described themselves as suffering from a mental illness or discussed a family member who was mentally retarded or mentally ill.

[95]The court believes it extremely unlikely that anyone would appear in person before the court and falsely claim to be a class member or to have a close connection to the class. One mother of a beneficiary spoke convincingly of the courage required of her to speak publicly of her child's problems because of the stigma society continues to attach to mental illness. Final Hearing (Nov. 1-2, 1994).

[96]Ironically, the more common problem with notice in class actions is insufficient notice that **excludes** many class members. If notice in this case had been sent only to current recipients of state mental health services, as Mr. Gottstein and Mr. Walker urged, all past and future beneficiaries who were not current recipients would have been excluded. Also excluded would be class members for whom the state does not currently offer services. The number of class members fitting into this latter category could be fairly large.

[97]The reaction of the general public is not a factor.

The reasons behind the class comments were at least as important to the court as the actual tally of class comments "for" or "against" the settlement. A democratic vote by informed class members with a full understanding of the issues bearing on the settlement in any large and complex class action would be impossible. In re Agent Orange, 597 F. Supp. at 760-61. A court has the authority to approve a settlement even when a significant percentage of the class or named plaintiffs oppose it, as long as the court determines the settlement to be fair, reasonable and adequate and in the best interests of the class. See, e.g., Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1421-22 (D. Minn. 1987); see also Armstrong v. Board of School Directors, 616 F.2d 305, 326 (7th Cir. 1980) (opposition is relevant but "not dispositive even when many class members object"). This is particularly likely where a case is long and complex and most class comments reflect a lack of understanding of the legal issues underlying the lawsuit or the risks and uncertainties inherent in a trial. See Armstrong, 616 F.2d at 326; In re Agent Orange, 597 F.Supp. at 759.

2. Results of written comments

Overall, written comments from the class were approximately two to one (2:1) in favor of approval for the settlement. Approximately three hundred beneficiaries, family members, guardians, advocacy groups, and mental health workers said the court should "approve" the HB 201 settlement. Almost one hundred and fifty beneficiaries, family members, guardians, advocacy groups, and mental health workers urged the court to "reject" the settlement.[98]

Despite the publicity this case has received during the past several years, the comments reflected much confusion and many

[98]The court may approve or reject a class settlement, but has no authority to amend it. Manual for Complex Litigation, Second § 30.41, at 237. When the person commenting placed conditions on acceptance that were not part of the settlement or stated that the settlement should be accepted only if amended, the court considered the comment to be recommending rejection. At the same time, the court recognizes that some of these people might not have chosen rejection if they had thought rejection would lead to trial rather than to a new settlement.

misconceptions regarding this case, class actions generally, and settlement of class actions in particular. The written comments indicated that few people obtained information beyond the notice.

Many people commenting appeared to believe that the trust and beneficiaries would receive nothing if the settlement is not approved. Many commented that the settlement should be approved simply because society has an obligation to help the mentally ill and retarded.

Several class members or their families provided no reason for their recommendation of approval or rejection. This made it impossible for the court to determine whether they had at least a rudimentary understanding of the case and settlement.[99] A few class comments did not directly recommend either approval or rejection of the settlement and showed enough confusion about the case and settlement that the court was forced to count the comment as "unknown." For the purposes of an overall tabulation of class opinion, however, class members who marked a box for acceptance or rejection while not providing a reason were assumed to have the same degree of understanding as the majority of the class or their representatives. The court views the "approve" and "reject" tabulations as merely indicative of the general trend of class opinion. Of greater interest to the court are the reasons given for approval or rejection.

Many commentators volunteered the opinion that mental health services in Alaska are presently inadequate, and some describe long waiting lists or the complete lack of a particular service. Some of these people urged the court to approve the settlement so that mental health services could be expanded. Others who described inadequate services believed the legislature would use the existence of the trust fund as an excuse to cut appropriations from the general fund for mental health, particularly

[99]Mr. Jessee's October 24, 1994, affidavit was helpful with regard to eight comments from mentally retarded class members residing at Hope Cottages. The affidavit shows the difficulties in evaluating comments from a class containing members who are mentally challenged.

as oil revenues decline.[100] Still others urged settlement approval because they believed the legislature had expressed frustration with the lack of a settlement by cutting funding for mental health services.

Class comments opposing settlement had concerns that included: (1) DNR would manage the trust lands; (2) the value of the lands in the reconstituted trust was much lower than the value of original trust lands; (3) the active Usibelli coal leases were not included in the reconstituted trust; (4) a legislature in the future could make changes adverse to trust beneficiaries; and (5) there was no guarantee of adequate funding for even the current level of state mental health services.

One of the biggest concerns of those opposing the settlement was DNR management of trust lands. A few seemed incensed that the same agency which breached the trust in the beginning would continue to manage trust lands under the settlement. Some believed DNR was simply incompetent and incapable of maintaining accurate records of trust lands. People concerned about DNR management preferred an agency outside of the existing structure of state government to manage the land. A few indicated that the Trust Authority alone should have control over all of the trust assets.

Another major concern expressed in class comments opposed to the settlement was the inadequacy of the total compensation to the trust. Some were disturbed that the total number of acres in the reconstituted trust was less than the original

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[100]Several commentators viewed the recent reduction in beds at the Alaska Psychiatric Institute as an example of the legislature's inclination to reduce the present level of mental health services. The Commissioner for the Department of Health and Social Services, however, indicated the reduction in services at API was based on a professional decision. Final Hearing, testimony by Commissioner Lowe (Oct. 25, 1994). Commissioner Lowe stated that no one who met the criteria for admission had been denied admission to API. Id. The modern trend for such hospitals is to provide tertiary care for very serious complex cases of mental illness and shorter crisis-oriented care. Id. On the other hand, the Commissioner admitted that the change in policy for API was occurring more rapidly than initially planned due to budget cuts. Id.

one million acre grant. Several thought the trust should receive both the surface and subsurface estate for all trust lands. The belief that the land being returned to the trust was not as valuable or productive as the land lost to the trust was frequently expressed, often with the opinion that the Usibelli leases should be included in the reconstituted trust. Several people concerned about land values stated that the State should at least pay fair market value for unreturned land and they did not believe the settlement was adequate in this respect. A few thought the State should pay for all surveys of trust lands and encumbrances. There was an underlying sentiment that the State was not being sufficiently penalized for breaching the trust.

Other common concerns involved the legislature and funding. Several class comments expressed fear that the legislature would make adverse changes in the future or even repeat the redesignation action that precipitated this case. These people longed for assurances that this would not happen. Many of those opposed to the settlement believed that the legislature would use the existence of the trust as an excuse to cut mental health funding from the general fund. Some of these people felt they were getting little from the settlement because most mental health services would remain dependent on appropriations from the general fund.

Class comments in favor of approval for the settlement provided reasons such as (1) more energy should be spent on the provision of services rather than on litigation; (2) the HB 201 settlement was the best the class could get and further litigation would not produce better results for the class; (3) the case had lasted long enough and the time had come to settle; and (4) the combination of land, cash, and the Trust Authority was adequate as a settlement, and more litigation would not be likely to bring a better result.

Many class comments favoring approval simply stated it was time to end the case and move on to providing services for the beneficiaries. They believe money should be diverted from litigation to services for beneficiaries. One class member said he

needed unavailable services now and could not wait any longer. Another person wrote a detailed description of the lack of services in bush villages and urged approval of the settlement so that more services could be provided.

Several commentators liked the idea of a cash fund managed by the Alaska Permanent Fund Corporation. A few found no problem in DNR management as long as the Trust Authority had oversight. Several thought that having the Trust Authority determine how trust income is spent would eliminate some of the politics from mental health budgeting. These people and others believed that mental health funding needed to be more stable; some added that beneficiaries needed to be able to depend on the continuing availability of services. They believed the Trust Authority could provide this stability.

3. Class comments at the final hearing

The court allowed an opportunity for oral comments from class members, families and organizations in an Anchorage courtroom all court-day on October 24, at the Alaska Psychiatric Institute in the evening of October 25, and in a Fairbanks courtroom from 2:45 p.m. to 6:00 p.m. on November 1 and 2. A total of 79 people commented during the hearing, 35 in Anchorage and 44 in Fairbanks. Because the overall number of people wishing to make comments during the final hearing was small, the court permitted a few members of the public to speak. As with the written comments, the court considered only the 67 comments from people connected to the class to be class comments relevant to the issue of whether to grant final approval of the settlement. The court has entered a single tabulation for those who commented orally and in writing.

Overall, nineteen class comments in Anchorage favored approval, eleven favored rejection, and two could not be determined. In Fairbanks, twenty class comments favored approval, thirteen favored rejection, and two could not be determined. The majority of class comments came from close

family members of beneficiaries and representatives of organizations rather than from beneficiaries themselves.[101]

People who favored approval of the settlement were often more resigned than enthusiastic. Some commented that attention should switch from litigation to the provision of services. A few were concerned that money spent on litigation was taking money away from mental health programs. They believed that settlement would bring more funding for programs benefiting beneficiaries. Overall, class comments in favor of approval reflected a feeling that the case had lasted long enough and that this settlement was adequate or at least the best result the class could get.

The Trust Authority was viewed as a major benefit of the settlement. In this regard, one family member pointed out that by having DNR manage the land and the Permanent Fund Corporation manage the monetary corpus, the Trust Authority could concentrate more on programs and services of direct benefit to the beneficiaries. It was hoped that the Trust Authority would be an effective advocate for mental health program funding when the mental health budget comes before the legislature each year.

One of the greatest concerns of those commenting against approval of the settlement was DNR management of trust lands. There was strong opposition to placing the agency which is viewed as having mismanaged trust lands in the past in charge of the reconstituted trust lands. The fact that the trust lands would be managed by a separate unit seemed not to have significantly decreased the distrust of DNR.

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[101]Among the organizations represented at the hearing were Advocacy Services, Alaska Addiction Rehabilitation Services (Nugen's Ranch), Alaska Alliance for the Mentally Ill, Alaska Crippled Children's Association, Alzheimer's Association, Anchorage Alliance for the Mentally Ill, Fairbanks Alliance for the Mentally Ill, Fairbanks Resource Agency (provider of services for developmentally disabled and Alzheimer's patients), Governor's Council for the Handicapped, Independent Living Council (Access Alaska), and Project Teach (services for developmentally disabled).

Some of the objectors believe the class will not benefit from this settlement. They are convinced that the legislature will not adequately fund mental health programs from the general fund so that income from the trust will be used entirely to continue funding current services rather than to provide new or expanded services. They point out that income from the initial $200 million will not come close to meeting the annual $130 million budget for state services for beneficiaries. As a result, they feel the class has nothing to lose by continuing with litigation. In answer to the court's question regarding their choice between the HB 201 settlement or trial, all but one of the objectors preferred trial.[102]

Some people who spoke against the settlement obviously feel terribly wronged by the State's breach of the trust. They view the State as untrustworthy and perceive a continued reluctance on the part of the State to care about the needs of the beneficiaries. Many view the non-settlement provisions of HB 201 as an unfair threat by the legislature. Many felt that the legislature could not be trusted in the future. More than one person spoke of seeking justice. There seemed to be a sense of outrage underlying the comments of those opposing the settlement.

4. Conclusion

The court has carefully read and considered every written class comment. During the final approval hearing in Anchorage and Fairbanks, the court carefully listened to every comment and has considered each one. The time expended by family members, beneficiaries, and their advocates to bring their concerns about the settlement to the attention of the court was sincerely appreciated. The court recognizes that speaking in person to a judge, particularly in a formal courtroom, was not an easy task for many people.

Those on either side of this emotional issue will undoubtedly feel betrayed if this court's decision is opposite their

[102]Few of the objectors choosing trial exhibited a full appreciation of the complex legal issues facing the litigants at a trial of this case or of the risks and costs inherent in any complex litigation.

own opinion. Those favoring the settlement believe the result for the class could be worse if this settlement is not accepted. They are convinced that the settlement is adequate at present and that further litigation will bring nothing better. Those opposing the settlement see no benefit for the class in the HB 201 settlement. They believe the class has nothing to lose by continuing the litigation to trial. The court notes that even with a two to one ratio in favor of the settlement, the objections among the class are not far from insignificant.

Two people who commented at the session held at API aptly illustrated the division among the class in this case. One woman, whose family member is a beneficiary and who had followed the case closely for the past six years, spoke in favor of the settlement. She talked about the importance of the Trust Authority and the program improvements. She opined that another settlement was not likely to be better than this one. She acknowledged that this settlement "won't answer the prayers of the beneficiaries and their families." A man who also had a family member who is a beneficiary spoke later against the settlement. He talked about the need to reinstate the trust and to assure that the trust is protected in the future. He too acknowledged that this settlement would not answer the prayers of the beneficiaries and their families, but he believed it was essential to fight on until they achieved something that would. On the whole, the class sees that there are problems with this settlement. Some would choose to accept the agreement as the best that can be achieved and turn their energies to the future. Others would choose to reject this settlement and any other unless the settlement was what all desire, assurances of a comprehensive mental health program which is fully funded and a trust which is guaranteed to pay the full costs of such a program.

The class comments were helpful in defining the differences between those who favor the settlement and those who oppose it. The court was touched by the sincerity of all who chose to write or speak and by the depth of their concerns. The class comments did not raise any new issues which had not been presented by counsel, but they gave breath to the statistics and life

to the many whose lives will be affected by this litigation. The court serves a fiduciary role in analyzing this proposed settlement. The class comments highlighted for the court the hopes and fears of the class and their families. The court has kept those images paramount when analyzing the complex facts and calculations which go into this decision.

The court agrees that there are problems and risks associated with this settlement. An ideal settlement would have included the leased coal lands in the Healy and Beluga fields,[103] provided for total responsibility and control of trust assets by a trustworthy fiduciary with total awareness of trust responsibilities, and would have assured the beneficiaries that necessary services would have guaranteed funding. This settlement is not ideal. It may not even be the best settlement that has been offered to the plaintiffs. However, the limited role of the court mandates that the court not compare the settlement with an ideal one. The task is to decide whether this settlement is "fair, adequate, and reasonable."

Considering all these factors, the court concludes that when viewed with other factors considered for final approval, the class opposition to the HB 201 settlement is not of a type or amount to preclude final approval of the settlement.

F. Experience and Views of Counsel

The four attorneys for the class have disagreed about both of the two most recent proposed settlements, Chapter 66 and HB 201. Those objecting to the previous Chapter 66 settlement urge approval of the present HB 201 settlement; those who urged approval of the Chapter 66 settlement now object to the HB 201 settlement.

Newberg on Class Actions suggests that the weight accorded to the recommendation of counsel is dependent on factors such as (1) length of involvement in the litigation, (2) competence

[103]The only reason to exclude these lands was the political power of the coal industry. Complete justice would have demanded their return to the trust.

and experience in the particular type of litigation, and (3) the amount of discovery completed. Newberg on Class Actions § 11.47, at 11-112. In this case, Mr. Walker and Mr. Gottstein, who object to the settlement, have the longest involvement in the case. However, one or two fewer years involvement by Mr. Jessee, counsel for the developmentally disabled, and Mr. Volland, counsel for chronic alcoholics, is insignificant in the context of a twelve-year lawsuit. Mr. Gottstein has more experience with land issues, but Mr. Volland has more experience with class action settlements. In addition, Mr. Volland relied on the expertise of others more knowledgeable in land matters, including Mr. Gottstein's land staff, during negotiations for HB 201.

Some of the objections raised by Mr. Gottstein and Mr. Walker were addressed by the September amendments to HB 201 and HB 371. However, their primary objection is based on their argument that the original trust lands were much more valuable than the combination of land, cash, and the Trust Authority in the HB 201 settlement. This is a factual issue which occupied a major portion of the final approval hearing. Both sides presented the testimony of experts to support their valuation.

The court concludes that counsel for the class supporting the settlement, Mr. Volland and Mr. Jessee, had sufficient experience and access to knowledgeable staff to represent the class adequately. With the views of the four class attorneys equally divided, the court does not consider the support or opposition of the attorneys to be persuasive in determining the fairness of the settlement.

G. Defendant's Ability to Pay (Feasibility of the Settlement)

Given the decline in oil revenues, a settlement such as this one which contains primarily land and some cash is more feasible than one containing more cash. The legislature has already passed legislation appropriating the $200 million and providing for the land conveyances, establishment of the Trust Authority, and changes in the budgeting process for the mental health programs. Ch. 66, SLA

1991; Chs. 5-6, FSSLA 1994; Chs. 1-2, SSSLA 1994. The court concludes that the State is capable of performing the agreement.

H. Extent of Discovery Completed

The extent of discovery completed is considered because it is an indicator of the ability of the court and counsel to evaluate the merits of the class claims. Armstrong, 616 F.2d at 325. In this case there has been extensive discovery of some types of information and little or no discovery regarding others.

There appears to have been little discovery with regard to the amount the State has spent on past services for beneficiaries. The State has, over the years, provided lists of such expenditures. The plaintiffs have disputed those lists as overinclusive. Evidence of such expenditures would be required at a trial in order to calculate the amount of setoff to which the State might be entitled.[104]

There appears to have been little or no discovery regarding evidence of the State's mismanagement of the trust which could mitigate the setoff for state expenditures on the mental health program. There has been little, if any, inquiry into receipts before the redesignation legislation for which the State has never accounted. Similarly, there are several issues raised in AMHA's Second Amended Complaint that have not been pursued up to this point.

In contrast, extensive discovery has been done with regard to land values and third party titles. These would be major issues at a trial. During implementation of the Chapter 66 settlement, the plaintiffs' land office created and collected substantial information about the original mental health trust lands and other state lands which were potential substitute lands. The court also ordered DNR

[104]Despite the legislature's attempt to establish the setoff amount unilaterally in HB 201, the court views the amount of setoff to be a factual question appropriately determined through the presentation of evidence before a trier-of-fact.

to permit plaintiffs' attorneys the opportunity to review DNR's public files. Memorandum Decision and Order Re: Discovery Motions, at 54-56 (June 3, 1994).

It appears that no amount of additional discovery would completely resolve the land valuation issue. Most of the value attributed to the original and substitute trust lands comes from mineral potential. The mineral potential of most of the land appears to be speculative, inasmuch as virtually no drilling has been done on the lands. The reports and expert testimony at hearings has provided extensive information on this issue.

The court concludes that plaintiffs' attorneys had sufficient information, under the circumstances, with which to negotiate this settlement and evaluate the difficulties of obtaining full relief at trial. The court also finds that the information presented to the court during the preliminary and final approval process has been adequate for the court's evaluation of the settlement and the risks of continued litigation.

VI. RESPONSE TO MAJOR OBJECTIONS TO THE SETTLEMENT

Weiss and AMHA believe that further litigation would at a minimum result in a requirement that the trust be managed solely in the interests of beneficiaries as well as recovery of most of the original trust lands.[105] Weiss & AMHA Opp. to Approval, at 15. They believe that the minimum acceptable settlement should provide the same result. Id. The court believes Weiss and AMHA have overestimated what they will be able to prove at trial and have underestimated the risk that the trust corpus could be smaller after further litigation. However, the settlement should not be judged in comparison with the maximum possible recovery if the class claims were fully litigated. See In re Agent Orange, 597 F. Supp. at 762.

[105]Weiss and AMHA expect that all of the original trust lands could be recovered except "(1) parcels subject to land sale contracts (2) parcels actually occupied and used by State agencies, and (3) parcels conveyed to CIRI, although land received in exchange with CIRI could be recovered. Weiss & AMHA Opp. to Approval, at 15.

The risks accompanying continuation of litigation must be considered simultaneously with the strengths of the plaintiffs' case. Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1408 (D. Minn. 1987). Avoidance of the risks of litigation justify a settlement smaller than the maximum possible remedy.

A. Inadequate Compensation for Value of Original Trust

Weiss and AMHA contend that the total value of the original trust is approximately $1.9 - 2.0 billion, while the value of the HB 201 settlement is $750 million.[106] Weiss & AMHA's Opposition to Final Approval of HB 201 Proposed Settlement, at 4 (October 12, 1994). The assumption that a trial would result in a reconstituted trust valued at approximately $2 billion underlies their argument that the settlement is inadequate. Weiss and AMHA believe that most of the original trust lands could be recovered. Weiss & AMHA Opp. to Approval, at 10, 15. The court disagrees. Weiss and AMHA also insist that the original trust lands could produce enough revenue to meet the necessary expenses of a basic mental health program at least for the trust beneficiaries in greatest need of services. Weiss & AMHA Opp. to Approval, at 21; see also Ch. 66, § 26, SLA 1991 (priorities among beneficiaries). The court disagrees.

Weiss and AMHA suggest that much of the disagreement over value could be avoided by conveying to the trust all original trust land not conveyed to third parties. Weiss & AMHA Opp. to Approval, at 6. They argue that the State's refusal to take this action is evidence that the original trust lands are more valuable than the State claims. Id.

Weiss and AMHA's argument ignores the fact that over 300,000 acres of the original trust lands are in legislatively designated areas such as parks and wildlife areas. The primary

[106]The $750 value is derived from an application of Mr. Erickson's deductions. The court stands by its position discussed in the Memorandum Decision on Preliminary Approval that this is comparing apples to oranges. To truly compare original trust to the settlement one would have to make deductions from the $1.9 - 2.0 billion as well. Doing so results in approximately equivalent values.

reasons the State refuses to relinquish these lands are reflected in the purposes for the legislative designations rather than in the development value of these lands. In addition, Weiss and AMHA ignore the high probability that trust lands in state parks and similar areas would be extremely difficult to develop due to strong opposition by environmental groups, recreational interests, and others interested in the preservation of whatever wildlife habitat or other values the legislative designations were intended to protect.

Weiss and AMHA argue that delay in production of revenue from some trust lands, particularly those in legislatively designated areas, should not reduce the estimated value of the original trust. Weiss & AMHA Opp. to Approval, at 7. However, delay in revenue production from land due to the time required for development is a valid consideration when compared with the immediate revenue production potential of $200 million in cash. Not only will the cash payment into the trust fund produce revenue sooner, but the risk of producing no revenue at all is much lower than with land development.

Weiss and AMHA have argued that significant development would have occurred sooner on original trust lands if the State had managed them properly. Possibly more drilling to obtain detailed mineral information would already have been done in the most promising mineral areas on trust lands. However, testimony during the final hearing indicated that only one large-scale hardrock mine, the Red Dog Mine, presently operates commercially in Alaska. Original trust land comprises only a small percentage of the total land area in Alaska. If mismanagement was the sole reason for lack of mineral development on trust land, one would expect more than one large hardrock mine to be operating in the state.

B. Specific Lands Comprising the Trust Under HB 201

Weiss and AMHA object to the exclusion of certain original trust parcels, especially those which are already producing revenue. Although the land trust as reconstituted by HB 201 is composed of parcels chosen by plaintiffs' attorneys during the

Chapter 66 settlement process, Weiss and AMHA argue that the most valuable parcels in the Chapter 66 settlement are not included in the HB 201 settlement. For example the original trust contained coal deposits in the Healy and Beluga regions, including Usibelli coal leases, which are not being returned under HB 201. The State refused to include these coal lands in the settlement, presumably to avoid objections to the settlement by the coal industry. Class members opposing the settlement point out that royalty payments from the Usibelli leases could have been an immediate source of revenue from trust land without the development delay necessary on most trust lands. Another potential source of revenue are material sites on original trust land that are likely to be used for road construction or other construction projects. Some of these sites have been included in the reconstituted trust under HB 201, but others have not.

Weiss and AMHA argue that elimination from the trust of all parcels to which there existed any serious objection during settlement negotiations has significantly decreased the potential for revenue production from trust lands. Weiss & AMHA Opp. to Approval, at 17. Several class members expressing opposition to the settlement were suspicious that trust lands no one else wanted were not worth much. Given that so many non-class interests appeared to have "first pick" from original trust lands and the pool of potential substitute lands, the suspicions of class members are quite understandable.

Everyone agrees that the lands in the reconstituted trust under HB 201 have a total value less than that of the original trust lands. The difference in value is compensated with the $200 million cash payment and establishment of the Trust Authority. Weiss and AMHA themselves state that the $200 million cash can be expected to annually earn approximately six times the amount of the royalty from the Usibelli lease. If litigation continues, the trust is unlikely to obtain any cash with which to earn an immediate annual income of six million dollars. In addition, at least one substitute parcel has high mineral potential since a portion has been leased for the Fort Knox gold mine near Fairbanks.

Groups which intervened in opposition to Chapter 66 were actively included in negotiation of the HB 201 land lists. Coal companies, oil companies, environmental groups, and hardrock miners were included in negotiations for the HB 201 settlement to avoid the kind of opposition that greatly delayed and complicated the court's consideration of the Chapter 66 settlement. There has been no outside opposition to HB 201.

Proponents of the settlement also hope the early involvement of environmental groups will enable the trust to develop most trust lands without interference from environmental interests. This should decrease the amount of time and money necessary to develop many of the trust lands, thus increasing the overall net revenue to the trust.

C. Possibility of Legislative Actions Contrary to the Settlement

A major concern of class members objecting to the settlement is the ability of the legislature to pass legislation in the future that would materially change the terms of the settlement after the claims of the class have been dismissed with prejudice. It is true that nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist.

First, the State has specifically agreed in the Settlement Agreement not to oppose a new action brought by plaintiffs under Rule 60(b) for relief from judgment in the event of a material breach of the Agreement.[107] Settlement Agreement, art. VI, §§ 5

[107]The following provisions of HB 201 constitute material terms of the agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50, and 51 of HB 201 and sections 1 and 2 of HB 371. Settlement Agreement, art. VI, § 5, at 15 (June 10, 1994). If the Legislature materially alters or repeals any of those provisions, the plaintiffs' remedy is a new action alleging that the mental health trust has not been adequately reconstituted and seeking whatever relief may be appropriate in light of the plaintiffs' claims. Settlement Agreement, art. VI, § 5, at 15. The Settlement Agreement also provides that "failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief

and 7, at 14-15, 17; see also State's Reply to Weiss' and AMHA's Opp. to Approval of HB 201 Proposed Settlement, at 34 n.23 (October 19, 1994) (reflects State's intent). A few class members have expressed the fear that a court receiving such a motion would be reluctant to grant such relief unless the legislature's action is particularly egregious. Nevertheless, the Rule 60(b) motion is an available remedy for a material change made in this settlement unilaterally by a future legislature. Alaska R. Civ. P. 60(b)(6). For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent.[108]

Of course, if a court grants plaintiffs relief from the judgment dismissing their claims with prejudice, the State would be expected to argue that HB 201 was curative legislation which retroactively made the 1978 redesignation valid. See State's Opening Pre-Hearing Memorandum in Support of Final Hearing, at 22-26 (Oct. 11, 1994). The State's ability to make such an argument is not a flaw in the settlement, but is merely a result of the legislature's passage of HB 201 and HB 371. The State has already suggested that such an argument will be made if this settlement fails and litigation continues. Plaintiffs would be in the position they will be if the settlement is not approved.

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from judgment [pursuant to Alaska Civil Rule 60(b)(6)] and no party shall oppose such a motion." Settlement Agreement, art. VI, § 7, at 17.

The State has specifically declared that if a future legislature materially alters or amends any of the material terms in HB 201, the State could not defend on the ground that the plaintiffs had agreed in the Settlement Agreement that the trust was adequately reconstituted. State's Reply to Weiss' and AMHA's Opposition to Approval of HB 201 Proposed Settlement, at 34 n.23 (Oct. 19, 1994); Settlement Agreement, art VI, § 5, at 14. The plaintiffs could file a new case at essentially the same place at which this case is being settled. State's Reply, at 34 n. 23. The only major difference would be the effects of time on land titles and land usage.

[108]The institutional memory of the legislature may not be long, but one function of the Trust Authority is to serve as a reminder of the trust obligations owed to the beneficiaries.

Second, the Trust Authority will exist as an advocate for the trust. The Trust Authority can be expected to actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority also may be in a position to influence the governor to veto any legislation which makes a material change in this settlement. Given the notoriety of this case, it is unlikely the legislature could override such a veto.

Third, stability in land titles and state land management is in the interest of third parties, such as purchasers of state land, hardrock miners, and oil companies. Such third parties would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit.

D. DNR Management

One of Weiss and AMHA's concerns about DNR management of trust lands under HB 201 is the section 17(b) requirement that trust lands be managed under laws applicable to other state lands. Weiss and AMHA suggest that the "maximum management for the benefit of the Trust achievable under the HB 201 regime is the minimum permissible under the Enabling Act." Weiss & AMHA Opp. to Approval, at 20. They seem to ignore the reference in section 17(b) to subsection (a) of section 17 which means that management under state land laws is subject to the State's trustee duties under the Enabling Act. At the same time, their concerns legitimately arise from an emphasis in the language of section 17(b) on management according to laws applicable to the State's general grant lands rather than management for the benefit of the trust.

Another concern about section 17 is the provision within subsection (c)(4) calling for "management for multiple use of trust land." The term "multiple use" is a common land management term, and yet the meaning often varies with one's viewpoint. With regard to mental health trust lands, environmental groups can be

expected to emphasize recreation, fish habitat protection, and similar uses involving little development. Mining and forestry interests will emphasize uses involving the extraction of natural resources.

Subsection (c) lists three other considerations which the regulations implementing section 17 management of trust lands must address, two of which are "maintenance of the trust land base" and "management for the benefit of the trust." Ch. 5 § 17(c), FSSLA 1994. Weiss and AMHA discuss the existence of a conflict in the HB 201 management scheme. If section 17 is viewed in its entirety, however, there is actually no conflict between the subsections. Management for multiple use of trust land is appropriate to the extent that all management decisions are made in accordance with trust principles. Ch. 5 § 17, FSSLA 1994. For example, a parcel might be suitable for a temporary interim use until a particular resource can be extracted more profitably or a material site might be sold or leased for another use after the usable material has been extracted. It might be possible to sell the timber on a parcel before a mine is developed.

HB 201 requires DNR to consult with the Trust Authority as well as submit annual reports describing management activities on trust lands.[109] Ch. 5 § 9, FSSLA 1994. The separate trust unit of DNR probably will be funded by money allocated from the trust income account by the Trust Authority.[110] Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). See also Settlement Agreement, Att. C & D (June 10, 1994) (Reimbursable Services Agreement will probably be used to pay DNR from trust account). When the Trust Authority contracts with DNR to manage trust land, as required by HB 201, the Authority can include provisions requiring DNR to actively promote mineral exploration or other

[109]DNR must obtain actual approval from the Trust Authority before exchanging trust land under AS 38.05.801(b)(2).

[110]HB 201 provides that money in the income account "may only be used for" six listed purposes, one of which is reimbursement to DNR for the cost of managing trust land. Ch. 5 § 16, FSSLA (to be codified as AS 37.14.041).

development activities deemed appropriate by the Trust Authority. See Ch. 5 § 9, FSSLA 1994.

E. Trust Authority Has Responsibility for Preserving Trust Assets Without the Management Authority

Weiss, AMHA, and some of the class comments opposing the settlement are concerned about placement of fiduciary responsibility with the Trust Authority while actual management authority is in the hands of DNR and the Permanent Fund Corporation. Both agencies managing trust assets are required only to consult the Trust Authority in most circumstances.[111] The objectors insist this gives DNR and the Permanent Fund Corporation power over trust assets without any accountability, because the agencies have no express fiduciary responsibility to the trust. They object to the Trust Authority bearing the burden of being responsible for proper management of trust assets without the power to direct the management.

The advantage of this split in responsibilities is that each of the three entities can concentrate in their area of expertise. The Alaska Permanent Fund Corporation has demonstrated its ability to manage a similar monetary fund satisfactorily. There were few comments against management of the $200 million by the Permanent Fund Corporation. DNR has a marred history, but the agency has personnel with much experience and technical expertise in managing large tracts of land in Alaska.[112] This leaves the Trust Authority to concentrate on coordinating with the four legislatively-established groups representing the major beneficiary groups to plan services to meet the needs of beneficiaries and to budget the money to fund the services. The Trust Authority can hire staff, which makes the Trust Authority much more than advisory commissions of the past. For the first time, the mental

[111]One exception is the exchange of land, which requires Trust Authority approval. Ch. 5 § 9, FSSLA 1994.

[112]In addition, the director of the separate unit is expected to be hired from outside of DNR. Final Hearing, Testimony of DNR Commissioner Harry Noah (Oct. 25, 1994). This will decrease the likelihood that previous DNR policies would be applied again to trust lands.

health community will have an advocate within state government with the potential to draw attention effectively to the needs of beneficiaries.

The court agrees, however, that it would be better if either the Trust Authority had complete management responsibility or the Trust Authority was free not to contract with DNR and the Permanent Fund Corporation. However, this determination has little to do with whether the HB 201 should receive final approval. The court may not compare this settlement with an ideal settlement. The appropriate task is to compare this settlement with the likely results of litigation. The likely result of litigation is general directions to the State to manage the trust in the interests of the beneficiaries and under the Enabling Act. The court does not believe that DNR management with those directions would be better than management as provided by the settlement.

F. Concern Regarding Constitutionality of the Trust Authority's Power to Spend Trust Income

Weiss and AMHA argue that the Trust Authority's power to spend the trust's income free from further legislative appropriation is an illusion. They contend that the legislature did not clearly give the power to the Trust Authority in HB 201, and if the legislature intended to give such a power to the Trust Authority, it may be unconstitutional.[113]

Only the Settlement Agreement expressly gives the Trust Authority the right to spend trust income free from further legislative involvement. Settlement Agreement, art. V, § 4, at 12. HB 201 grants the Trust Authority the power to administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The purposes for which money in the trust income account may be used are listed in detail in HB 201. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). HB 201 also specifically gives the Trust Authority the authority to award grants

[113]The Alaska Constitution grants the legislature the exclusive power to appropriate state funds. Alaska Const., art. IX, § 13.

and contracts funded by money from the trust income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.045).

"[A]ny illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis." Armstrong, 616 F.2d at 320. Neither the Settlement Agreement nor HB 201 is obviously unconstitutional. When reviewing a settlement, a court should not rule on any legal issue not necessary for settlement. See Armstrong, 616 F.2d at 320.

G. Concern that the Legislature Will Cut Mental Health Funding From the General Fund

Despite the overwhelming concern about funding in many class comments, the claims brought in this lawsuit have no direct relationship to funding for services. The claims focus on the State's breach of the trust established by the Enabling Act in 1956. From the beginning of this lawsuit, there appears to have been misconceptions among many people about the extent to which the trust was capable of producing sufficient revenue to support the state's mental health program. There was no guarantee of adequate funding in the original trust; the lack of guarantee in the settlement certainly cannot make it inadequate.

The HB 201 settlement expressly states that basic mental health funding will continue to come from the general fund. There is no pretension that the reconstituted trust will be able to support the state's basic mental health program. The legislature cannot avoid its responsibility to the state's mentally ill, mentally retarded, and other disabled Alaskans who are beneficiaries by reliance on the trust. One of the Trust Authority's functions will be to act as an advocate for the integrated comprehensive mental health program's general fund budget. The budgeting advantages should help the Trust Authority in that advocacy.

A related concern expressed by Weiss and AMHA is the possibility that the basic mental health program will receive insufficient funding from the legislature and that trust income will

be spent on nonessential services. They believe the Trust Authority should be required to spend trust income on the basic program if the basic program is not adequately funded.[114]

Their underlying concern appears to be that the Trust Authority might spend the trust income on services for alcoholics and the mentally retarded, who are represented by counsel supporting the settlement, while services for the mentally ill are inadequately funded from the general fund. There is no reason to assume that the Trust Authority would favor one group over another. Each of the four beneficiary groups will be equally represented on the panel which recommends individuals to be members of the Board of Trustees of the Trust Authority. The Trust Authority has a duty to "deal impartially with the different trust beneficiaries." Ch. 5 § 8, FSSLA 1994, amending Ch. 66 § 10, SLA 1991 (to be codified as AS 37.14.007(b)(12)). In addition, the court has defined the beneficiaries in terms of the groups who may not be excluded from trust-funded services. Memorandum Decision and Order, at 16-17 (April 27, 1988).

VII. CONCLUSION

Settlement involves compromise by all parties. The State could attempt to obtain a large setoff to eliminate any cash payment. The class could litigate third party interests and legislative designations in order to increase the amount of original trust land returned to the reconstituted trust. However, the costs in money and delay would be so enormous that it is doubtful any party would emerge better off. The beneficiaries of the trust would continue to wait for whatever benefits resolution of this case might bring them. Already one of the named plaintiffs, Carl Weiss, has reached adulthood without resolution of the case bearing his name. Even when viewed in the best possible light, litigation will not bring enough additional benefit to the trust and its beneficiaries to warrant the additional costs and delays required.

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[114]Ironically, the requirement desired by Weiss and AMHA could actually encourage the legislature to underfund the basic program.

This case began in 1982 and the parties have attempted settlement since 1985. This settlement may not meet the expectations of the class for full funding of an integrated comprehensive mental health program, but it is fair, adequate, and reasonable under the circumstances of this case. In view of this settlement, continuing this litigation would merely "contribute to the seemingly Methuselean duration of this case," and would "sacrifice [both] justice and efficiency without any rational basis." Armstrong, 616 F.2d at 327.

The court is required to protect the interests of the class within its best judgment, considering all relevant factors. "The strong opposition of a considerable number of sincere and well-motivated members of the class cannot, under these circumstances, be decisive." In re Agent Orange, 597 F. Supp. at 763. There has been and continues to be a critical shortage of services for class members. Clearly mental illness, retardation, and other conditions within the class definition place a heavy burden on the individuals suffering from these conditions and their families. However, this single case alone cannot resolve the funding crisis in the mental health field, no matter how compelling and real the need is for many class members. The citizens and the legislature of Alaska must face the obligation to provide adequate mental health services for the less fortunate among us.

This litigation has accomplished some very important things. First, it has made people aware of the mental health trust and the fiduciary obligation of the State with respect to that trust. The court does not believe that the State would dare treat these lands like other state lands without regard to the State's fiduciary obligations. If it does so, there are people and institutions prepared to stop the action before much damage is done. The beneficiaries, though perhaps weak by themselves, are strong together. They have advocacy groups with long institutional memories. The Trust Authority, if it does its job, will serve as a watchdog to ensure that neither DNR nor the legislature mismanages these trust lands again. Whatever else has been learned, it must have been learned that these lands must be managed in the best interests of the beneficiaries. If anyone tries to assert a lesser standard, without

question there will be more litigation. If the State is wise, it will not fall back into this quagmire. Second, the litigation has provided a mechanism for the beneficiaries to influence both the funding of the comprehensive mental health program and the planning of state programs. The Trust Authority is an integral part of this settlement; without it, the court probably would not have granted final approval. Whether the reconstituted lands trust will produce or the original lands trust could have produced sufficient funds to maintain adequate services could be debated forever without resolution. However, it is clear that the sometimes powerless have been empowered. The Trust Authority can be a powerful advocate for the real needs of those who have so much difficulty advocating for themselves.

The settlement process as a whole has done some harm. The class and their families are very divided on the question of this settlement. Some may feel cheated and abandoned by this decision approving it. Others may feel vindicated. Hopefully, neither will persist in those feelings. Whether or not to approve this settlement was a very difficult and complex decision. The court shares many of the concerns that have been expressed by the class. The task that lies ahead for the beneficiaries, their friends and families is to come together to make the best of this agreement. The beneficiaries will need to speak with one voice once again, if their concerns are not heeded. They need to heal the divisions that exist today and vow as recommended by one commenting beneficiary to go "out of the courts and into the budget."

The court is responsible for ensuring that the settlement is in the best interests of the class as a whole in view of all the factors to be considered in final approval. Given the circumstances of this case and the complex factual and legal issues that would arise in further litigation, the court finds that the settlement submitted for approval on June 10, 1994 is in the best interest of the class.

ORDER

For the reasons discussed above, it is ordered that FINAL APPROVAL for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994 is GRANTED. The court is distributing a proposed dismissal order to the parties.

DATED at Fairbanks, Alaska this 6th day of December, 1994.

MARY E. GREENE
Superior Court Judge