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Re 4FA-07-2696
Memorandum Decision &
Order

# of pages 40

From Fairbanks Superior Court

2-29-2008

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

COUNCIL OF ALASKA PRODUCERS, ASSOCIATION OF ANCSA REGIONAL CORPORATION PRESIDENTS/CEOs, INC., ALASKA FEDERATION OF NATIVES, INC., and PEBBLE LIMITED PARTNERSHIP, acting through its General Partner, PEBBLE MINES Corp.,

Plaintiffs,

vs.

SEAN PARNELL, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and the STATE OF ALASKA, DIVISION OF ELECTIONS, JOHN H. HOLMAN, JACK G. HOBSON and LUKI AKELKOK,

Defendants.

Case No. 4FA-07-2696 CI

MEMORANDUM DECISION AND ORDER

Introduction

This is a pre-election review of the validity of two voter initiatives. With a few restrictions, Alaska's voter initiative process allows the people of Alaska to directly enact laws. Prior to the election, the only issue that may be reviewed by the courts is whether the proposed law falls within the scope of one of those restrictions. Alaska Constitution article XI, section 7 imposes a restriction that prohibits appropriations from being enacted by voter initiative. As to both initiatives before the court, the key question is whether the proposed laws are appropriations within the meaning of article XI, section 7.

Under the initiative known as 07WATR, the primary question is whether the banning of water use in large scale metallic mining is an appropriation. As to the other initiative, 07WTR3, the question is whether the regulation of a public asset is an appropriation. This decision concludes that 07WATR is invalid as an improper appropriation of a public asset, water, in violation of article XI, section 7 of the Alaska Constitution, because the banning of one use of a public asset, here, water use in mining, is an "appropriation" as that term is used in article XI, section 7. This decision also concludes that 07WTR3 is not an appropriation, because the legislature is left with discretion to allocate water among competing needs. The other arguments raised by the plaintiffs are not considered in this pre-election decision because there is no clear controlling authority that the measures are clearly unconstitutional or unlawful.

Parties & Proceedings

On November 9, 2007 the Council of Alaska Producers ("CAP") commenced this action against Lieutenant Governor Sean Parnell and the State of Alaska Division of Elections ("State") seeking declaratory relief and an injunction barring the certification of and invalidating the two initiatives. The Association of ANCSA Regional Corporation Presidents/CEOs and the Alaska Federation of Natives ("ANCSA CEO's") commenced a separate lawsuit (4FA-07-2764) against the State concerning the initiatives seeking the same remedy. Consolidation of 07-2764 with this case occurred on December 6, 2007. Pebble Limited Partnership, acting through its General Partner, Pebble Mines Corporation ("Pebble") filed a complaint in intervention to participate in the action because the Pebble Mine project would be impacted by the initiative if enacted. John H. Holman, Jack G. Hobson, and Luki Akelkok ("Sponsors"), the sponsors of the two initiatives, also moved to intervene in the action. The court granted Pebble's and the Sponsors' requests to intervene and they were joined as parties.

The court held a case management status hearing on December 21, 2007. At that hearing the parties agreed to a process to resolve the issues presented concerning the two initiatives. CAP agreed to withdraw its then pending motion for preliminary injunction. The parties agreed to a briefing schedule for the filing of summary judgment motions setting forth all arguments to allow a prompt as possible trial court resolution to enable a relatively speedy appeal to the Alaska Supreme Court. The parties and the court recognized that prompt resolution was necessary given that the first statewide election on which the initiatives may appear is in August 2008 and the State must send the ballots to the printers on or about July 10, 2008.

Briefing was complete January 25, 2008 and oral argument was held February 12, 2008.

The Initiatives

As noted, two initiatives are at issue.

A. 07WATR

Initiative 07WATR proposes to place on the ballot a law that prohibit "large-scale metallic mineral mines" ("LSMMs") that release any pollutants whatsoever into water used by humans or salmon. 07WATR provides in part:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

> **Section 1. Purpose.** The purpose of this Act is to protect the statewide public interest in water quality by ensuring that Alaska's waterways, streams, rivers and lakes are not adversely impacted by new large scale metallic mineral mining operations and to ensure that prospective large scale metallic mineral mining operations are compatible with the state's interest in having clean waters.
>
> **Section 2. Protections and prohibitions affecting streams and waters.** Notwithstanding any other provision of law, a person or entity may not, for large scale metallic mineral purposes, engage in any activity that directly or indirectly:

(a) releases any toxic pollutant into, or causes or contributes to any toxic pollution of, any surface or subsurface water, or tributary thereto that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species; or that

(b) uses, releases or otherwise generates, within any watershed utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species:

(1) cyanide, or

(2) sulfuric acid, or

(3) compounds of cyanide or sulfuric acid, or

(4) other toxic agents that may be harmful, directly, indirectly or cumulatively to human health or to the spawning, rearing, migration, or propagation of salmon;

(c) stores or disposes of metallic mineral mining wastes, including overburden, waste rock, and tailings that may generate sulfuric acid, dissolved metals, chemicals or compounds thereof.

(d) stores or disposes of metallic mineral mining wastes, including overburden, waste rock or tailings in, or within 1000 feet of any river, stream, lake, or tributary thereto, that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species.

(e) causes acid mine drainage, heavy metals or dissolved metals to enter directly into, or indirectly by subsurface water into, any river, stream, lake or tributary thereto, that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species.

Section 3. Scope. Section 2 of this Act does not apply to existing large scale metallic mineral mining operations that have received all required federal, state, and local permits, authorizations, licenses, and approvals on or before the effective date of this Act.

. . .

Section 5 Definitions[1]

a) "large scale metallic mining operation" means a mining operation that extracts metallic minerals or deposits and utilizes or disturbs in excess of 640 acres of lands or waters, either alone or in combination with adjoining, related or concurrent mining activities or operations. This term includes all components of a mining project, including but not limited to:

(i) mining, processing, the treatment of ore in preparation for extraction of minerals, and waste or overburden storage or disposal;

[1] Section 5 of each measure identically defines "large scale metallic mine."

(ii) any construction or operation of facilities, roads, transmission lines, pipelines, separation facilities, and other support and ancillary facilities;

(iii) any mining or treatment plant or equipment connected with the project, underground or on the surface, that contributes or may contribute to the extraction or treatment of metallic minerals or other mineral product; and

(iv) any site of tunneling, shaft-sinking, quarrying, or excavation of rock for other purposes, including the construction of water or roadway tunnels, drains or underground sites for the housing of industrial plants or other facilities.

. . .

The Lieutenant Governor denied certification of 07WATR on June 21, 2007. The sponsors of 07WATR filed a lawsuit, *Holman, et al v. Parnell* Case No. 3DI-07-56 CI, against the Lieutenant Governor because of his failure to certify 07WATR. CAP, the ANCSA CEO's and Pebble were not parties to the suit. The matter was briefed and argued before Superior Court Judge Fred Torrisi who ordered the initiative certified on October 12, 2007. The Lieutenant Governor appealed the decision to the Alaska Supreme Court. See Case Number S-12909 *Parnell v. Holman*. That appeal is pending.

On January 14, 2008, the sponsors submitted signature booklets with apparently enough signatures to place the measures on the ballot. The Lieutenant Governor has sixty days to determine whether the signatures comply with the requirements of AS 15.65.

B. 07WTR3

07WTR3 proposes a law that prohibits LSMMs that discharge effluent that adversely affects humans or salmon. 07WTR3 provides in pertinent part:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

Section 1. Purpose. The purpose of this Act is to protect the statewide public interest in water quality by limiting the discharge or release of certain toxic pollutants on the land and waters of the state, and by establishing management standards and other regulatory prescriptions to ensure that Alaska's waterways, streams, rivers and lakes, an important public asset, are not adversely impacted by new large scale metallic mineral mining operations and that such prospective operations are appropriately regulated to assure no adverse effects on the state's clean waters.

Section 2. Regulatory standards affecting streams and waters.

(a) Notwithstanding any other provision of law, approvals, authorizations, licenses and permits for a prospective large scale metallic operation may not be granted or issued to a person or entity to allow activity that directly or indirectly:

(1) releases or discharges a toxic pollutant or pollutants, in a measurable amount that will effect human health or welfare of any stage of the life cycle of salmon, into, any surface or subsurface water, or tributary there to; or that

(2) stores or disposes of metallic mineral mining wastes, including overburden, waste rock, and tailings in a way that could result in the release or discharge of sulfuric acid, other acids, dissolved metals, toxic pollutants or other compounds thereof that will effect, directly or indirectly, surface or subsurface water or tributaries thereto used for human consumption or salmon spawning, rearing, migration or propagation;

(b) This measure is intended to regulate the operations described herein to prevent the release or discharge of toxic pollutants and other chemicals into the waters of the state. This measure shall not result in the appropriation of lands or waters of the state in any fashion associated with new large scale mining operations. Use of the surface and subsurface waters and the land off the state for a prospective large scale metallic mining operation is not prohibited but is subject to regulation to ensure protection of human health, and welfare and conservation of other state resources which also rely on the waters and land of the state.

Section 3. Scope. section 2 of this Act does not apply to existing large scale metallic mineral mining operations that have received all required federal, state, and local permits, authorizations, licenses, and approvals on or before the effective date of this Act or to future operations of existing facilities at those sites.

. . .

The plaintiffs have each filed motions for summary judgment seeking a ruling that both initiatives are invalid and should not appear on a ballot in 2008 and that 07WATR should not have been certified by the Lieutenant Governor.

The State and Sponsors each filed cross-motions for summary judgment. The Sponsors oppose the plaintiffs' motions for summary judgment with respect to both initiatives. The State opposes the plaintiffs' motions with respect to initiative 07WTR3, and argues that certification was proper. However, the State agrees with the plaintiffs that initiative 07WATR should not have been certified by Judge Torrisi.

Background

The Pebble Mine project, a large mining project, is being planned on state and ANCSA land near Lake Iliamna. The project has sparked opposition based on water quality concerns. The controversy has pitted proponents of mining the "world-class" mineral deposit against opponents, who believe mining effluent draining into streams and rivers will adversely affect the Bristol Bay salmon fishery. According to the State's Cross Motion for Summary Judgment opponents have submitted at least five voter initiatives related to mining and water quality to the State of Alaska, Division of Elections. Two of the initiatives, 07WATR and 07WTR3, are at issue here.

Both initiatives apply only to LSMMs, defined in each initiative as metallic mining projects disturbing or using more than 640 acres, "either alone or in combination with adjoining, related or concurrent mining activities or operations." The measures expressly exclude fully permitted LSMMs and 07WTR3 additionally excludes "future operations of existing facilities at those sites."

On its face, the purpose of initiative 07WATR is to "protect the statewide public interest in water quality" by ensuring that Alaska's waters "are not adversely impacted by new large scale metallic mining operations" and to ensure that LSMMs are compatible with the state's interest in having clean waters.[2]

07WATR prohibits a LSMM from engaging in any activity that directly or indirectly:

> (a) releases any toxic pollutant into, or causes or contributes to any toxic pollution of, any surface or subsurface water, or tributary thereto that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species; or that
>
> (b) uses, releases or otherwise generates, within any watershed utilized by humans for drinking water or by salmon in the spawning, rearing, migration or propagation of the species: (1) cyanide, or (2) sulfuric acid, or (3) compounds of cyanide or sulfuric acid, or (4) other toxic agents that may be harmful directly, indirectly or cumulatively to human health or to the spawning, rearing, migration or propagation of salmon;
>
> (c) stores or disposes of metallic mineral mining wastes, including overburden, waste rock, and tailings that may generate sulfuric acid, dissolved metals, chemicals or compounds thereof.
>
> (d) stores or disposes of metallic mineral mining wastes, including overburden, waste rock or tailings in, or within 1000 feet of any river, stream, lake, or tributary thereto, that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species.
>
> (e) causes acid mine drainage, heavy metals or dissolved metals to enter directly into, or indirectly by subsurface water into, any river, stream, lake or tributary thereto, that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species.[3]

The stated purpose of initiative 07WTR3 is to establish "management standards and other regulatory prescriptions" to ensure that the state's waters suffer "no adverse effects" from large-scale metallic mineral mining.[4] 07WTR3 prohibits the release of pollutants "in a measurable amount that will

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[2] Section 1 of 07WATR.
[3] Section 2 of 07WATR.
[4] Section 1 of 07WATR.

[a]ffect human health or welfare or any stage of the life cycle of salmon" or the storage or disposal of metallic mineral wastes in a way that could result in the release of pollutants that "will [a]ffect, directly or indirectly, surface or subsurface water or tributaries thereto used for human consumption or salmon spawning, rearing, migration or propagation."[5] The CAP exhibits contain copies of the initiatives and copies of the legal analyses of the initiatives completed by the state Attorney General's Office to aid the lieutenant governor in his certification decisions.

With this assistance from the Alaska Department of Law, Lieutenant Governor Parnell determined that 07WATR was an impermissible appropriation because it prevented the use of land and water by large scale metallic mineral mining companies.[6] Because the Alaska Supreme Court has held that only the legislature may designate the use of public assets between competing needs, the Lieutenant Governor concluded that the initiative violated article XI, section 7 of the Alaska Constitution. Consequently, the Lieutenant Governor declined to certify voter initiative 07WATR.

As previously noted, Judge Torrisi disagreed with the Lieutenant Governor and issued a decision in favor of the sponsors and certified 07WATR.[7] Judge Torrisi found that the facts before the court indicated that it was "virtually unassailable" that 07WATR would effectively ban large scale metallic mineral mining in Alaska.[8] Nonetheless, he determined that a ban on one use of an asset does not constitute an appropriation of the asset and therefore 07WATR was a proper subject of an initiative.[9]

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[5] Section 2(a)(1) of 07WATR3.
[6] *See* CAP Mtn. Sum. J., Exh. 3 (2007 Op. Att'y Gen. (June 21; 663-07-0179)).
[7] CAP Mtn. Sum. J., Exh. 5 (Judge Torrisi's written decision).
[8] *Id.* at 6.
[9] *Id.* at 16-17. Because only the State and the Sponsors were parties to the Dillingham case, the plaintiffs in the present case are not bound by Judge Torrisi's ruling with respect to 07WATR in the

With respect to 07WTR3, Lieutenant Governor Parnell, again with the assistance of the Department of Law, decided that 07WTR3 did not ban LSMMs, but merely sought to impose regulations to prevent adverse effects to water, humans, and salmon.[10] He concluded that unlike 07WATR, initiative 07WTR3 did not seek to prevent use of public assets, but merely sought to regulate. The State's position is that initiatives that prevent one or more uses of a public asset is an impermissible appropriation, while initiatives that seek to regulate use of a public asset without preventing use of such assets is permissible regulation. Thus, the Lieutenant Governor certified 07WTR3 but rejected 07WATR.

Discussion

A. Summary Judgment

All parties seek summary judgment. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Alaska R.Civ.P. 56(c).

B. Scope of Pre-election Review

With some exceptions, the initiative process allows the people of Alaska to directly enact laws. Article XI, section 1, of the Alaska Constitution states that "[t]he people may propose and enact laws in the initiative." Article XI, section 7, of the Alaska Constitution lists subjects which may not be included in an initiative: "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." These

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present case. *See AVCP Regional Housing Authority v. Vranckaert Co.*, 47 P.3d 650, 654-56 (Alaska 2002).

[10] CAP Mtn. Sum. J., Exh. 8 (2007 Op. Att'y Gen., (Oct. 17; 663-07-0179)).

restrictions are intended to remove "certain particularly sensitive or sophisticated areas of legislation" from "emotional electoral dialogue and impulsive enactment by the general public."[11]

The people's broad constitutional right to legislate by initiative "should be liberally construed to permit exercise of that right."[12] Indeed, the constitution itself states in article XII, section 11 that "unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of article XI." The Alaska Supreme Court has provided an example of the type of clearly controlling authority that might allow a proposed initiative to be removed from the ballot: "The initiative's substance must be on the order of a proposal that would 'mandat[e] local school segregation based on race' in violation of *Brown v. Bd. of Educ.* before the clerk may reject it on constitutional grounds."[13] The kind of basic subject matter usually addressed by a constitutional provision rather than legislation would be "clearly inapplicable" to the initiative process.[14] An initiative cannot enact laws that the legislature has no authority to enact.[15] "[G]eneral contentions that the provisions of an initiative are unconstitutional" may be considered pre-election "only . . . if 'controlling authority' leaves no room for argument about its unconstitutionality."[16]

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[11] *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 170 (Alaska 1991), *quoting Thomas v. Bailey*, 595 P.2d 1, 8 (Alaska 1979).
[12] *Thomas v. Bailey*, 595 P.2d 1, 3 & n. 12 (Alaska 1979).
[13] *Alaska Action Center v. Munic. Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (citations omitted).
[14] *See Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 300 (Alaska 2007).
[15] *Id.* at 302.
[16] *Alaska Action Center* 84 P.3d at 992; *see also Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003) (Alaska 2003); *Alaskans for Efficient Government v. State*, 153 P.3d 296, 298 (Alaska 2007); *Kohlhaas v. State, Office of Lieutenant Governor*, 147 P.3d 714, 717-18 (Alaska 2006); *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004).

However, even with the broad interpretation of the citizens' constitutional right to enact laws by voter initiative under article XI, section 1, the concomitant article XI, section 7 restrictions are on equal footing:

> As forceful a mandate for liberal construction as [XII, section 11] may be, however, it includes an explicit limit. Only the law-making powers *assigned to the legislature* are to be liberally construed as within the people's right to legislate by initiative. As we have noted, the constitution, in article IV, section 1, does not assign the rule-making power at issue here to the legislature, but rather to the courts.
>
> Similarly, it does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, section 11 concludes with a qualifying, cautionary clause: 'subject to the limitations of Article XI.' This reiterative warning underscores the importance of the restrictions. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. We must interpret all constitutional provisions-grants of power and restrictions on power alike-as broadly as the people intended them to be interpreted. (emphasis in original)[17]

In summary, the only issue in pre-election initiative disputes is whether the proposed law can be enacted by voter initiative. In turn, this requires a determination of whether a constitutional restriction is in issue or whether for some other reason the initiative is clearly unlawful. In analyzing the issue, it must be

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[17] *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 168 -169 (Alaska 1991). *See also Boucher v. Engstrom*, 528 P.2d 456, 460 (Alaska 1974) ("The people for their own protection have provided that the initiative shall not be employed with respect to certain matters.") *But compare Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999) ("[W]hen reviewing initiative challenges, we liberally construe constitutional provisions that apply to the initiative process. Specifically, we narrowly interpret the subject matter limitations that the Alaska Constitution places on initiatives. Still, we have a duty to give questions involving the propriety of an initiative's subject matter 'careful consideration because the constitutional right of direct legislation is [also] limited by the Alaska Constitution.'") This court's conclusions in this decision would not change if the court narrowly interpreted the subject matter limitations contained in the Alaska Constitution but still gave the matter "careful consideration."

recognized that voter initiatives are construed broadly to preserve the right of the people to enact laws, but a review must ascribe equal weight to the constitutional restrictions set forth in article XI, section 7 and elsewhere in the constitution.

Therefore, the first consideration is whether the initiatives are appropriations. Then the court will determine whether the initiatives are unconstitutional or unlawful under clear controlling authority, while construing the initiative so it is constitutional if possible. Finally, the court will consider the adequacy of the State's ballot summary.

C. 07WATR is an Appropriation

The plaintiffs contend that 07WATR essentially bans large scale metallic mineral mining by prohibiting the release of any pollutant whatsoever into surface or subsurface water that is used by "humans for drinking water or by salmon for spawning, rearing, migration or propagation of the species."[18] The Sponsors agreed at oral argument that for the purposes of summary judgment review the trial court may assume that 07WATR bans LSMMs.[19] Also CAP, ANCSA CEO's, and Pebble argue, and the affidavit of Richard Mylius states, that 07WATR will effectively shut-down large-scale metallic mineral mining for the foreseeable future because LSMMs need to use water and in the process discharge a certain amount of pollutants into Alaska waters in order to feasibly operate. Thus, a key issue is whether the banning of one use of a public asset is an "appropriation" as that term is used in article XI, section 7.

Justice Eastaugh succinctly summarized the analysis to determine whether an initiative is an appropriation in *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*:

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[18] CAP Mtn. Sum. J., Exh. 1.
[19] Oral argument at 11:49

> Article XI, section 1 of the Alaska Constitution gives Alaskans the right of direct legislation. Section 1 states: 'The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.' The initiative power is limited, however, by article XI, section 7, which provides that '[t]he initiative shall not be used to ... make or repeal appropriations.' That provision prohibits initiatives that would give away public assets. We use a two-part inquiry to determine whether a particular initiative makes an appropriation. First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, land, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding whether the initiative would have that effect, we have looked to the 'two core objectives' of the limitation on the use of the initiative power to make appropriations. One objective is preventing 'give-away programs' that appeal to the self-interest of voters and endanger the state treasury. The constitutional delegates were concerned that '[i]nitiatives for the purpose of requiring appropriations [would] pose a special danger of rash, discriminatory, and irresponsible acts.' The other objective is preserving legislative discretion by 'ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.' (emphasis in original).[20]

The cases involving the second objective are particularly relevant. In *McAlpine v. University of Alaska*, the Court concluded that the first sentence of an initiative creating a state community college system was unobjectionable because it was not an appropriation since it left the legislature with discretion to determine size and manner of relevant payments.[21] However, the Court rejected another portion of the same initiative because it specified the amount of state assets to be transferred to the community college system, allowing the state only the discretion to "designate the precise articles or parcels to be transferred."[22]

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[20] 151 P.3d 418, 422-423 (Alaska 2006)(citations omitted)
[21] 762 P.2d 81, 91 (Alaska 1988).
[22] *Id.*

One significance of *McAlpine* is the Court's extension of the holdings of *Thomas v. Bailey*[23] and *Alaska Conservative Political Action Comm. v. Municipality of Anchorage*.[24] Those cases held that laws requiring the conveyance of state assets to people or entities outside the control of the state government are appropriations under article XI, section 7 and cannot be enacted by initiative, regardless of whether the assets are money or other property. *McAlpine* concluded that "appropriation" encompasses more than just give-away programs. In expanding the scope of "appropriation" to the designation of the use of public assets, the court explained its reasoning:

> Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets. (emphasis in original).[25]

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[23] 595 P.2d 1 (Alaska 1979). *Bailey* held that since the delegates to Alaska's constitutional convention "wanted to prohibit the initiative process from being used to enact give-away programs, which have an inherent popular appeal, that would endanger the state treasury," the constitutional prohibition preventing 'appropriations' by initiatives prohibits an initiative whose primary object is to require the outflow of state assets in the form of land as well as money."

[24] 745 P.2d 936, 938 (Alaska 1987). Invaliding an initiative that would require a municipality to transfer a utility with a $32.7 million equity for the nominal sum of one dollar because it was precisely the kind of "rash, discriminatory, and irresponsible act" against which the state and its subdivisions are protected under art. XI, section 7. Therefore, the initiative made an unconstitutional appropriation.

[25] 762 P.2d 81, 88 (Alaska 1988).

In *McAlpine* the significant policy decision of creating a community college system was not objectionable. The problem in *McAlpine* was that the initiative attempted to allocate state assets by designating the use of the University of Alaska assets. In discussing that problem, the Court states emphatically that "only" the legislature may retain control over the allocation of state assets among competing needs. The Court also observed that the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. In *McAlpine*, the function of the asset would have changed from a state university asset to a community college asset. Consequently, changing the function of an asset is tantamount to an appropriation because the changing of a function of an asset prevents a use of an asset for a particular purpose and consequently strips the legislature of at least some of its discretion to allocate state assets between competing needs.

Pullen v. Ulmer echoes the same theme of legislative control of allocations.[26] There the Alaska Supreme Court held that the initiative made an appropriation because salmon were a public asset and the initiative reduced the legislature's and Board of Fisheries' control of and discretion over allocation decisions, particularly in the event of shortages, between the competing needs of users.[27] The Court reviewed its holdings in *Thomas v. Bailey*, *Conservative Political Action Committee v. Municipality of Anchorage*, *McAlpine v. University of Alaska*, and *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*.[28] Based on these decisions, the Court distilled two core objectives of the constitutional prohibition on the use of initiatives to make appropriations: (1) to prevent an electoral majority from

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[26] *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996)
[27] *Id.* at 63.
[28] *Id.* at 61-63.

bestowing state assets on itself; and (2) to preserve to the legislature the power to make decisions concerning the allocation of state assets.[29] The Court concluded:

> We think it is clear that the proposed initiative calls for an actual allocation, in the event of a shortage of a given salmon species in a given geographical region, to sport, personal use, and subsistence fisheries. In such circumstances there exists the very real possibility that the commercial fishers will be excluded from such fisheries. Thus the initiative cannot be viewed as merely protecting the relative positions of sport, personal use, and subsistence fisheries as against commercial fisheries. Nor can this initiative be construed as not impinging upon the legislature's and Board of Fisheries' discretion to make allocation decisions among competing needs of users.[30]

In a 2006 case, *Anchorage Citizens for Taxi Reform*, the Alaska Supreme Court held that taxicab permits were not public assets and therefore the taxi cab initiative did not violate the article XI, section 7 limitation on appropriation by initiative. The Court again stated the principle that only the legislative body may designate the actual use of assets.[31]

In *Staudenmaier v. Municipality of Anchorage*, the Supreme Court upheld the Superior Court's rejection of two initiative petitions as improper appropriations in violation of article XI, section 7 of the Alaska Constitution, even though the initiative directed that the municipality receive fair market value for the sale of the utility. Because the initiative would "designate how the Anchorage Assembly is to make use of municipal assets," it would effect an appropriation.[32] *Staudenmaier* quotes the above passage from *McAlpine* and reinforces the concept that the legislative body must retain control over the allocation of public assets between competing needs. "But where an initiative controls the use of public

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[29] *Id.* at 63.
[30] *Id.* at 64.
[31] *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423.
[32] 139 P.3d 1259, 1263 (Alaska 2006).

assets such that the voters essentially usurp the legislature's resource allocation role, it runs afoul of article XI, section 7."[33]

The Sponsors rely upon Justice Matthews' concurring opinion in *Staudenmaier* arguing that 07WATR directs public policy, but does not dictate the disposition of public property. Justice Matthews did state the uncontroversial proposition that voter initiative may direct profound changes in public policy. But, he continues, when that change creates surplus property, the disposition of that surplus property is solely a matter for the legislative body.[34] His statement is consistent with the often reiterated principle that it is solely the legislature's role to allocate resources.

The Sponsors also rely on *Alaska Action Ctr., Inc. v. Municipality of Anchorage.*[35] There Girdwood citizens launched a municipal initiative that stated the land in question was largely unsuitable for development, designated some municipal land as a park, and barred the use of the park for a golf course. The municipal clerk refused to certify the initiative on the ground that it made an appropriation. The Girdwood initiative was an appropriation because it would set aside a certain amount of property in Girdwood for a specific purpose, a park, in such a manner that it was executable, mandatory, and reasonably definite with no further legislative action.[36] The initiative stated what limited development was permissible in the park, such as trails and a campground.

The Alaska Supreme Court concluded that:

> The Anchorage municipal clerk was acting within her authority when she rejected the Girdwood initiative on the ground that it proposed to make an appropriation. Furthermore, her determination was correct--by

[33] *Id.*
[34] *Id.* at 1266
[35] 84 P.3d 989, 992 (Alaska 2004).
[36] *Id.* at 994-995

> designating a particular tract of land as a park, the initiative would commit specific public assets to a specific purpose, making an appropriation, an action that may not be taken by initiative. Without the impermissible park designation, the rest of the initiative may not go to the voters.[37]

In discussing the severance issue, the Court stated "[W]e cannot allow the golf prohibition to go before the voters without the park designation."[38] The Sponsors argue this is at least the Court's tacit approval of a voter initiative banning a single use of a public asset. However, given the almost constant reiteration in the voter initiative appropriation cases that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs, this court cannot accept the *Alaska Action* dicta as sufficient authority to allow a voter initiative to trump legislative control over the allocation of public assets. Further, it is difficult to reconcile the Sponsors' proffered concept, that the voters may ban a single use of a public asset, but may not change the function of an asset, which is a prohibited appropriation under *McAlpine*.

In the present case, this court concludes that 07WATR is an appropriation. First, it is clear that the streams, rivers and other waters within the state, like land and salmon, constitute a public asset under article VIII of the Alaska Constitution.[39] Second, 07WATR reduces the government's discretion over allocation of water use and appeals to the self-interest of users of salmon and people currently using drinking water from sources that might be used by large-scale mining.[40] Initiative 07WATR allocates water to the use of salmon and people using the same water source for drinking water and effectively prohibits an allocation to large-scale metallic mining interests. Initiative 07WATR would leave the government without the

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[37] *Id*. at 996.
[38] *Id.* at 995.
[39] *See Anchorage Citizens for Taxi Reform*, 151 P.3d at 424, *citing Pullen v. Ulmer*, 923 P.2d at 60-61; *Thomas v. Bailey*, 595 P.2d 1, 8 (Alaska 1979).
[40] *Id. citing Pullen v. Ulmer*, 923 P.2d at 60-61.

discretion to allow large-scale metallic mining to operate, because 07WATR would prohibit the discharge of "any" pollutants into streams, rivers, and groundwater. Initiative 07WATR essentially attempts to appropriate water only to human drinking water and salmon. Therefore, 07WATR " 'designate[s] the use of ' amounts of " water that large-scale metallic mineral mining would use by allocating it to humans and salmon "in a way that encroaches on the legislative branch's exclusive 'control over the allocation of state assets among competing needs.' "[41] Initiative law in Alaska requires that the legislature retain discretion to allocate public assets such as water to all uses, including large-scale metallic mining, and not just to salmon and downstream communities.[42] Further, the Court has noted that the changing of a function of an asset circumvents the initiative prohibition. Banning water use by a LSMM changes the function of water from mining use to only human or fish use and foils the legislature's role as the sole appropriator under the Alaska Constitution.

This court concludes that the constitutional prohibition against appropriations by voter initiative applies to the prohibition of one use of a public asset. Therefore, the court determines that 07WATR violates the constitutional prohibition of article XI, section 7 against appropriations made in voter initiatives.

D. Initiative 07WTR3 is Not an Appropriation of Public Assets

The plaintiffs argue that 07WTR3 prohibits any effects, either good or bad, on water quality. Alternatively, the plaintiffs and the State request a declaratory judgment finding that 07WTR3 prohibits

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[41] *See Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993 (Alaska 2004); *Anchorage Citizens for Taxi Reform*, 151 P.3d at 421-24; *Pullen v. Ulmer*, 923 P.2d at 60-63; *Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987). *See also Brooks v. Wright* 971 P.2d 1025, 1033 (Alaska 1999) (initiative may deal with management of natural resources, but not appropriation of natural resources).

[42] *See Anchorage Citizens for Taxi Reform*, 151 P.3d at 421-24; *Pullen v. Ulmer*, 923 P.2d at 60-63.

"adverse" effects. First, the express intent behind 07WTR3 is to prohibit "adverse" effects upon human drinking water and salmon life cycles. The stated purpose of the initiative uses the term "adverse." To infer that the initiative prohibits beneficial effects or neutral effects is at odds with common sense and the purpose of the initiative. Furthermore, an initiative should be construed "broadly so as to preserve [it] whenever possible."[43] The initiative may be preserved by construing the language in section 2 of the initiative to mean "adverse" effects. When a court reviews an initiative, it looks to any published summary as well as the published arguments of sponsors and opponents to determine the meaning voters would attach to the initiative.[44] The State's summary of 07WTR3 describes the initiative as prohibiting "adverse" effects, which corresponds with the stated purpose of the initiative.[45]

Second, 07WTR3 is distinguishable from 07WATR. 07WATR prohibits "any" discharge, but 07WTR3 prohibits only a discharge of a type and in an amount that adversely affects humans and salmon. 07WTR3 states a permissible management or regulatory policy. Unlike 07WATR's prohibition against "any" discharge regardless of type and size, 07WTR3 permits an LSMM to operate if its release of pollutants has no adverse effect upon human drinking water and the salmon life cycle. The initiative does not appropriate water to humans and salmon to the exclusion of large-scale metallic mineral mining, provided a LSMM does not have an adverse effect on water quality.

ANCSA CEOs contend that even if 07WTR3 is interpreted with the term "adversely," the initiative still prohibits all mining unless it contains specific standards. However, current state water quality statutes

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[43] *Anchorage Citizens for Taxi Reform* 151 P.3d at 422 (Alaska 2006); *Fairbanks v. Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991).
[44] *See Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 193 (Alaska 2007).
[45] CAP Mtn. Sum. J., Exhs. 7, 9.

do not contain specific standards.[46] Specific standards are set by the appropriate administrative agencies.[47] If 07WTR3 is adopted by the voters, then the Department of Environmental Conservation ("DEC") would adopt specific water quality standards to implement the measure's mandate to prohibit adverse effects on humans and salmon from large-scale metallic mineral mining. DEC would determine the specific contamination levels at which adverse effects to humans and salmon occur.

1. The Regulatory Effect of 07WTR3 Does Not Constitute an Appropriation

The State argued that "[o]nly harmful amounts of discharge are prohibited and therefore 07WTR3, as a matter of law, cannot be an impermissible appropriation because it does not designate use amongst competing needs. It is permissible environmental regulation."[48]

In *Brooks v. Wright*,[49] the party challenging the wolf snare initiative did not claim that it fell within one of the limitations in article XI, section 7, of the Alaska Constitution, such as an appropriation.[50] He only argued that the initiative process was "clearly inapplicable" under article XII, section 11, to natural resource management decisions.[51] The Alaska Supreme Court concluded that the subject matter of wildlife management was not "clearly inapplicable" to the initiative process under article XII.[52] The Court also declined to decertify the initiative on public trust grounds or under article VIII.[53]

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[46] *See* AS 46.03.070.
[47] *See id.*
[48] State Reply at 8 (Feb. 1, 2008).
[49] *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999).
[50] *Id.* at 1027-28.
[51] *Id.* at 1028.
[52] *Id.* at 1030.
[53] *Id.* at 1033.

Brooks v. Wright did not address whether an initiative having a regulatory effect on a natural resource could be an appropriation, but a regulation prohibiting one way to trap wolves or how certain aspects of mining are performed to avoid harmful discharge into streams normally would not be viewed as an appropriation. Such regulations do not set aside a specified amount of state assets for a specific purpose or object in a manner that leaves the legislature with nothing further to do.[54] The only regulation that could be viewed as an appropriation would be one more like 07WATR, which is so prohibitive of one use that it effectively appropriates the resource to the remaining uses of the resource. In contrast, 07WTR3 leaves to the legislature, DEC, and DNR the discretion to determine what amounts of specific toxins discharged at a mining site will have harmful effects downstream upon salmon life cycles or human health. 07WTR3 allows mining operations to use water and discharge waste into water provided that toxic pollutants are not discharged at a level that would adversely affect humans and salmon.

Therefore, the court concludes that 07WTR3 constitutes a permissible management or regulatory measure, and is not an appropriation.

E. Is 07WTR3 Substantially Similar to Current State Water Quality Statutes and Regulations?

Article XI, section 4, of the Alaska Constitution states that when an initiative petition is filed, "[i]f, before the election, substantially the same measure has been enacted, the petition is void." If a "legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists."[55] It is

[54] *See City of Fairbanks*, 818 P.2d at 1157.
[55] *Warren v. Boucher*, 543 P.2d 731, 736 (Alaska 1975).

not necessary that the two measures be the same in every respect.[56] This makes sense, because an initiative, once enacted, may be amended at any time.[57]

Arguably, 07WTR3 could be viewed as "substantially the same" to current water quality statutes, AS 46.03.100 - .120, although current statutes do not specifically address large-scale mining. The general statement in AS 46.03.060 provides that DEC "shall develop comprehensive plans for water pollution control in the state and conduct investigations it considers advisable and necessary for the discharge of its duties." Additionally, AS 46.03.070. provides that DEC

> may adopt standards and make them public and determine what qualities and properties of water indicate a polluted condition actually or potentially deleterious, harmful, detrimental, or injurious to the public health, safety, or welfare, to terrestrial and aquatic life or their growth and propagation, or to the use of waters for domestic, commercial, industrial, agricultural, recreational, or other reasonable purposes.

18 AAC 60.455 makes mining waste subject to Alaska's water quality standards in 18 AAC 70 *et seq.*[58] Also, the definition of "toxic pollutants" in section (5)(b) of 07WTR3 appears the same as 18 AAC 70.990(62).

Initiative 07WTR3 focuses on prevention of adverse effects upon water quality as a result of a new large-scale metallic mineral mining operation and activities that accompany such an operation. The water

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[56] *Id.*

[57] Alaska Const. art. XI, § 6.

[58] 18 AAC 60.455. Mining waste. Except when the only chemical being used is a flocculent to enhance settling, tailings from hard rock mines, and tailings from placer mines that have been amalgamated or chemically treated, are subject to 18 AAC 60.010 - 18 AAC 60.265,18 AAC 60.400 - 18 AAC 60.495, 18 AAC 60.700 - 18 AAC 60.730, and 18 AAC 800 – 18 AAC 60.860 as necessary to prevent a violation of the air quality standards in 18 AAC 50 or the water quality standards in 18 AAC 70. The department will, in its discretion, incorporate applicable provisions of this chapter into a wastewater permit issued under 18 AAC 72 or a solid waste disposal permit issued under this chapter. (Eff. 1/28/96, Register 137; am 6/28/96, Register 138)

pollution control and waste disposal statutes (AS 46.03.050 - .120) cover metallic mineral mining as part of addressing mining waste in general. Also, 18 AAC 60.455 expressly states that mining tailings from hard rock mines and placer mines that have been chemically treated are subject to solid waste management regulations and water quality standards. However, 07WTR3 includes regulation of water quality with respect to roads built in the mining area, tunnels, and other activities at a large mine that are not included in the regulation of mining tailings in 18 AAC 60.455.

Pebble is focusing on the general goal of safeguarding water quality that both the initiative and current statutes share in common. However, 07WTR3 specifies that the water quality regulations apply to all aspects of a large mining project, including activities like road construction, tunneling, quarrying, and the removal of overburden, in addition to the chemical treatment of ore for mineral extraction that is expressly referenced in regulation 18 AAC 60.455. The express purpose of 07WTR3 is to ensure that Alaska's streams, rivers, and lakes are not adversely impacted by any aspect of large-scale metallic mineral mining operations.[59] An implied purpose of initiative 07WTR3 is to ensure that water quality, and the activities that depend on clean water, is not lost in a rush to promote the economic benefits from large-scale metallic mineral mining operations.

In *Trust the People*,[60] the Alaska Supreme Court clarified the three-part test from *Warren*[61] for determining whether a proposed initiative and legislation are substantially the same:

> A court must [1] first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; [2] next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative;

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[59] 07WATR section 1.
[60] *State v. Trust the People*, 113 P.3d 613, 621 (Alaska 2005).
[61] *Warren*, 543 P.2d at 736-40

> and [3] finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.[62]

The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted.[63] There are exceptions to the general rule but those exceptions are not applicable here as courts are only empowered to conduct pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful.[64] On the existing record, the court cannot rule that clear authority exists that the current statutory scheme is substantially the same as the initiative. Further, the legislature may take some specific action in response to the initiative if enacted. Therefore, Pebble's argument under article XI, section 4, of the Alaska Constitution that 07WTR3 is substantially similar to existing statutes and regulations is denied.

F. The Initiatives Are Not Improper Special or Local Legislation

The Alaska Constitution states:

> The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination.[65]

When legislation has singled out an area or group, courts examine

> the legislative goals and the means used to advance them to determine whether the legislation bears a "fair and substantial relationship" to legitimate purposes. If this standard is satisfied, the bill will not be invalid because of incidental local or private advantages. Legislation need not operate evenly in all parts of the state to avoid being classified as local or special.[66]

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[62] *Trust the People*, 113 P.3d at 621 (numbers added).
[63] *State v. Trust the People*, 113 P.3d 613, 614 n. 1 (Alaska 2005).
[64] *Alaskans for Efficient Government, Inc. v. State.*, 153 P.3d 296, 298 (Alaska 2007).
[65] Alaska Const. art. II, § 19.
[66] *Baxley v. State, DNR*, 958 P.2d 422, 430 (Alaska 1998), *quoting State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

"'Special legislation' is constitutional as long as it bears a 'fair and substantial relationship' to legitimate state objectives."[67] In this case, the initiatives have been drafted so they have a general application statewide. It is true that the initiatives apply only to large-scale metallic mineral mines, but other water quality regulations apply to smaller mines or non-metallic mines.[68] However, the court concludes that 07WTR3 bears a fair and substantial relationship to the legitimate purpose of regulating the effect of large-scale metallic mineral mining on water quality within Alaska to ensure that humans and salmon using Alaska waters are not adversely affected by large-scale metallic mineral mining operating upstream.

G. Is 07WTR3 Preempted by the Clean Water Act, Federal Mining Law, or ANCSA?

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land;...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Supremacy Clause obligates states to abide by federal law, thereby empowering Congress to preempt state law.

> The Supremacy Clause of article VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs [1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, [2] when there is outright or actual conflict between federal and state law, [3] where compliance with both federal and state law is in effect physically impossible, [4] where there is implicit in federal law a barrier to state regulation, [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a

[67] *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1057 (Alaska 2002).
[68] *E.g.*, AS 46.03.070 - .100; *see also Kelso v. Rybachek*, 912 P.2d 536, 541 (Alaska 1996).

> federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.[69]

The plaintiffs argue that 07WTR3 is preempted by federal law in three ways: (1) by enacting effluent limits and performance standards without complying with procedures required by the Clean Water Act; (2) by conflicting with and frustrating the purpose of the Alaska Native Claims Settlement Act (ANCSA), which conveyed lands to Native corporations for their economic benefit; (3) by conflicting with and frustrating the purpose of the Federal Mining Act, to foster and encourage the mining of mineral resources.

1. Clean Water Act.

The plaintiffs contend that the federal Clean Water Act preempts state law enacted through a process other than the administrative agency rule-making process. However, the plaintiffs have not cited any specific law or case supporting this proposition. Nothing in federal law prohibits the state legislature from enacting water quality statutes.[70]

The Clean Water Act (33 U.S.C. section 1251) states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.[71]

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[69] Louisiana Public Service Com'n v. F.C.C. 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898 - 1899 (U.S., 1986)(citations omitted)(numbering added).
[70] *E.g.*, AS 46.03.070 - .110.
[71] 33 U.S.C. § 1251(b).

Congress expressly reserved the authority of states to adopt standards more stringent than federal law by providing that nothing in the Clean Water Act would preclude the right of any state or political subdivision or interstate agency to adopt or enforce:

> (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States, with respect to the waters (including boundary waters) of such States.[72]

The Clean Water Act's definition of "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."[73]

The Clean Water Act requires federal agencies to cooperate with state and local agencies.[74] Additionally, courts in other jurisdictions have recognized the states' authority to establish more stringent measures to protect water quality than exist under federal law.[75] CAP has not cited any case in which a court held that the Clean Water Act preempts a state's ability to adopt more stringent measures

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[72] 33 U.S.C. § 1370.
[73] 33 U.S.C § 1362(11).
[74] 33 U.S.C. § 1313.
[75] *U.S. Steele Corp. v. Train*, 556 F.2d 822, 829 n.5 (7th Cir. 1977); *SED, Inc. v. City of Dayton*, 519 F.Supp. 979, 991 (S.D. Ohio 1981); *Pennsylvania Coal Mining Assoc. v. Watt*, 462 F.Supp. 741, 747 (D.C. Pa. 1983)

for waters within the state's boundaries. The interstate water pollution case cited by the plaintiffs is inapplicable, because it dealt with whether a state with more stringent standards could impose those standards on a source in a neighboring state with lower standards that was discharging into a river flowing into the state with higher standards.[76] When the conflict is between states, federal law preempts the law of the state with higher standards.[77] However, there is no interstate conflict in this case. The court concludes that there is no controlling authority that clearly indicates that 07WTR3 would be preempted by the Federal Clean Water Act.

2. Federal Mining Act

The Federal Mining Act provides for the free and open exploration of public lands for valuable mineral deposits and declares a policy of fostering and encouraging private development of mineral resources.[78] A state law that banned mining entirely would be an obstacle to the accomplishment of the purposes and objectives of the Federal Mining Act.[79] However, 07WTR3 does not ban mining; it merely regulates the use of water by a large-scale mine for discharging waste materials.

3. ANCSA

The main purpose behind Congress' grant of land to Native Corporations under ANCSA was to encourage economic development.[80] The plaintiffs contend that 07WTR3 would render Native corporation land worthless. However, 07WTR3 only regulates mining through water quality standards. In addition, it is not at all clear that the land would become worthless. Mines smaller than 640 acres as well as non-

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[76] *See International Paper Co. v. Oulette*, 479 U.S. 481, 498-99, 107 S.Ct. 805, 814-15, 93 L.Ed.2d 883 (1987).
[77] *Id.*
[78] *South Dakota MiningAss'n*, 155 F.3d at 1010.
[79] *Id.*at 1011.
[80] *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994).

metallic mines can operate on corporation land. Non-mining development can take place. It is not clear that the purposes of the land grant under ANCSA would preempt state regulation of large-scale metallic mineral mining pursuant to 07WTR3 if the initiative passes.

4. Controlling Authority Leaves Room for Argument About Preemption of 07WTR3

Absent controlling authority that leaves no room for argument about the initiative's preemption by federal law, the court should not decide the issue until and unless the initiative is enacted by the voters.[81] The State contends that the preemption question should be deferred until after the people have voted. The court agrees. Preemption under the Supremacy Clause, like other underlying constitutional issues involving the substance of the initiative, should not be considered pre-election unless there is clear controlling authority that the measure is unconstitutional.

Initiative 07WTR3 is not clearly preempted by the Clean Water Act, federal mining law or ANCSA. Therefore, it is inappropriate for this court to decide preemption issues before the election.

H. Takings Issue

A taking is not clearly unconstitutional unless there is no just compensation. In *Anchorage Citizens for Taxi Reform*, the Alaska Supreme Court stated:

> We therefore do not decide here whether taxicab permits are private property the taking of which requires just compensation, nor do we decide whether the initiative would result in any such taking. Our limited review is consistent with the principle that an initiative may be reviewed before going to the voters only to "ensure compliance with the 'particular constitutional and statutory provisions regarding initiatives.'"[82]

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[81] *Alaska Action Center*, 84 P.3d at 992; *Brooks*, 971 P.2d at 1027.
[82] *Anchorage Citizens for Taxi Reform*, 151 P.3d at 421 n.2, *quoting Trust the People*, 113 P.3d at 626.

This court may not reject an initiative on constitutional grounds unless "controlling authority' leaves no room for argument about its unconstitutionality."[83] As discussed above, 07WTR3 is a regulatory measure that prohibits LSMMs from discharging effluent that would adversely affect humans or salmon. 07WTR3 does not state that all discharges will be prohibited. There is no clear authority that the regulations resulting from 07WTR3 would constitute a taking of land containing large mineral deposits or rights to mining claims on state land. Since it is not clear that 07WTR3 would result in a taking, this court also cannot find that the State will be required to pay just compensation if 07WTR3 is enacted by voters.

I. Ballot and Petition Summaries and Statements of Costs

Courts apply a deferential standard of review in challenges to the lieutenant governor's summary of an initiative.[84] "The burden is upon those attacking the summary to demonstrate that it is biased or misleading."[85]

After an initiative application is certified, AS 15.45.090 requires the lieutenant governor to prepare petitions containing a copy of the proposed bill if it is 500 words or less or "an impartial summary of the subject matter of the bill."[86] The lieutenant governor also must include in the petition "an estimate of the cost to the state of implementing the proposed law."[87] If the circulated petitions are properly filed, AS 15.45.180 requires the lieutenant governor to prepare a ballot title and proposition:

> The ballot title shall, in not more than 25 words, indicate the general subject of the proposition. The proposition shall give a *true and impartial summary* of the proposed law. The total number of words used in the summary may

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[83] *Alaska Action Center*, 84 P.3d at 992.
[84] *Alaskans for Efficient Government v. State*, 52 P.3d 732, 735 (Alaska 2002), *quoting Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 (Alaska 1982).
[85] *Burgess*, 654 P.2d at 276; *Alaskans for Efficient Government*, 52 P.3d at 735.
[86] AS 15.45.090(a)(1)-(2).
[87] AS 15.45.090(a)(4).

> not exceed the product of the number of sections in the proposed law multiplied by 50. In this subsection, "section" means a provision of the proposed law that is distinct from other provisions in purpose or subject matter.[88]

Alaska Statute 15.45.180 also requires the lieutenant governor, with the assistance of the attorney general to prepare a "true and impartial" ballot summary for initiatives.[89] In practice, the lieutenant governor uses the same summary for both the petition and the ballot.

The basic purpose of the ballot summary is to enable voters to reach informed and intelligent decisions on how to cast their vote on the initiative question.[90] The summary should be free from misleading statements and provide a fair, neutral explanation of the proposal's contents.[91] "The summary may not be an argument for or against the measure, nor can it be likely to create prejudice for or against the measure."[92] A ballot summary must be accurate and impartial, but it will not be invalidated simply because the court may believe a better summary could be written.[93]

1. Summary and Cost Statement for 07WATR

After Judge Torrisi certified Initiative 07WATR, the lieutenant governor prepared the following summary:

> BILL PROVIDING FOR PROHIBITIONS ON CERTAIN ACTIVITIES BY LARGE METALLIC MINERAL MINING OPERATIONS

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[88] AS 15.45.180(a) (emphasis added).
[89] *Alaskans for Efficient Government*, 52 P.3d at 733.
[90] *Id.* at 735.
[91] *Id.* at 735; *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1218 (Alaska 1993); *Burgess*, 654 P.2d at 275.
[92] *Faipeas*, 890 P.2d at 1218, *quoting Burgess*, 654 P.2d at 275 (quoting with approval from *In re Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees of 1980*, 613 P.2d 867, 869 (Colo. 1980)). *See also Alaskans for Efficient Government*, 52 P.3d at 735.
[93] *Alaskans for Efficient Government*, 52 P.3d at 735.

> This bill imposes five prohibitions on new large scale metallic mineral mining operations in Alaska. The bill bars such a mining operation from releasing any amount of toxic pollutant into water that is used for drinking water or by salmon. The bill bars such a mining operation from storing mining wastes and tailings that could release sulfuric acid, dissolved metals or chemicals. Finally, the bill bars such a mining operation from storing mining wastes and tailings within 1000 feet of any river, stream, lake, or tributary that is used for drinking water or by salmon. The bill defines a large scale metallic mineral mining operation to mean a metallic mineral mining operation that is in excess of 640 acres in size. The bill defines toxic pollutants to include substances that will cause death and disease in humans and fish, and includes a list of substances identified as toxic pollutants under federal law.
>
> Should this initiative become law?[94]

With the aid of the Department of Natural Resources, the lieutenant governor prepared the following cost statement for implementation of 07WATR:

> **Estimate of Cost to State for Implementation:** As required by AS 15.45.090(a)(4) the Alaska Department of Natural Resources has prepared the following statement of costs to the State of implementing the law proposed in the Initiative 07WATR.
>
> **Statement of Costs and Revenues for Initiative 07WATR—Prepared by the Alaska Departments of Revenue and Natural Resources**
>
> **Costs**
>
> By prohibiting any discharge of certain pollutants, even if those discharges meet or exceed existing state and federal water quality standards, *this initiative would effectively prohibit most, if not all new large scale mining activity.*
>
> The Department (DNR) does not foresee any new costs from the initiative, as DNR would be in the position of denying most applications for hard rock mining developments greater than 640 acres. The Division of Project Management and Permitting, large mine permitting team would require less

[94] CAP Mtn. Sum. J., Exh. 6 (summary of 07WATR).

> fiscal support as there will be no large mines; however, these positions are funded in part by permit fees, which would also be reduced.
>
> **Revenues**
>
> The impacts of this initiative on State revenues are difficult to estimate. There would be a significant long term impact to state revenues in loss of royalty revenue from State lands and loss of mining tax revenues from state and private lands. DNR would also expect to see a decline in mining claims and related revenues.
>
> Future State mining revenues, and the associated impact of this initiative, depend on a number of factors, including future metals prices, costs of production, and the development of new mines. An analysis of potential State revenues from one large mine that would be prohibited by this initiative indicates that potential revenues of up to $5 billion over the life of the mine (40 years) could be eliminated by the initiative.
>
> When other statewide mining developments are considered, the potential loss of State revenues resulting from the initiative could total up to $10 billion or more over the next 30-40 years.[95]

Plaintiffs argue that the summary is defective because it fails to inform petition signers that 07WATR would end large scale metallic mineral mining in Alaska.[96] However, the first paragraph of the cost statement includes an explicit statement to this effect: "By prohibiting any discharge of certain pollutants, even if those discharges meet or exceed existing state and federal water quality standards, *this initiative would effectively prohibit most, if not all new large scale mining activity.*"[97] Since both the summary and cost statement appear on the petition, this does not demonstrate bias. The summary is a fair, neutral explanation of the contents of 07WATR, while the cost statement summarizes the expected decline in mining and the loss of mining revenues for the state.

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[95] CAP Mtn. Sum. J., Exh. 6 (07WATR Statement of Costs) (emphasis added).
[96] CAP Mtn. Sum. J. at 45.
[97] CAP Mtn. Sum. J., Exh. 6 (07WATR Statement of Costs) (emphasis added).

The plaintiffs also contend that the possible cost of potential claims of takings should be included in the cost statement. This argument must be rejected. Since a potential taking claim as a consequence of an initiative is not appropriate for pre-election consideration, there is no merit in the argument that potential takings claims should be included in the cost statement for the initiative.[98]

The court concludes that if 07WATR proceeds, the summary and cost statement are fair and impartial statements.[99]

2. Summary and Cost Statement for 07WTR3.

For the 07WTR3 initiative, the lieutenant governor prepared the following summary:

> **BILL PROVIDING FOR REGULATION OF WATER QUALITY**
>
> This bill imposes two water quality standards on new large scale metallic mineral mining operations in Alaska. The first standard does not allow such mining operation to release into water a toxic pollutant that will *adversely* affect human health or the life cycle of salmon. The second standard does not allow such a mining operation to store mining wastes and tailings that could release sulfuric acid, other acids, dissolved metals or other toxic pollutants that could *adversely* affect water that is used by humans or by salmon. The bill defines a large scale metallic mineral mining operation to mean a metallic mineral mining operation that is in excess of 640 acres in size. The bill defines toxic pollutants to include substances that will cause death and disease in humans and fish, and includes a list of substances identified as toxic pollutants under federal law.
>
> Should this initiative become law?[100]

The plaintiffs contend that the summary is defective because it does not state that the initiative would end large-scale metallic mineral mining. However, 07WTR3 does not ban large-scale metallic

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[98] *See Anchorage Citizens for Taxi Reform*, 151 P.3d at 421.
[99] *See Burgess*, 654 P.2d at 275.
[100] CAP Mtn. Sum. J., Exh. 9 (summary of 07WTR3) (emphasis added).

mineral mining as long as a mine can operate without adversely affecting human drinking water or the salmon life cycle.

The State's use of the term "adversely" in the summary for 07WTR3 is reasonable. Use of "adversely" in the summary reflects use of that term in the stated purpose in the initiative itself. When 07WTR3 is read as a whole, the term "adversely" is appropriate for the summary. Furthermore, the Sponsors' lack of objection to the lieutenant governor's summary, combined with their circulation of petitions containing it, "indicates their acquiescence to its interpretation of the measure."[101] Use of the term "adversely" to qualify provisions relating to the effect on the health of humans and salmon reflects the proper meaning of the provisions in 07WTR3.[102]

The ballot and petition summary for 07WTR3 is a fair, true, neutral, and impartial explanation of the main features of the initiative's contents.[103]

With the aid of the Department of Natural Resources, the lieutenant governor prepared the following cost statement for implementation of 07WTR3:

> **Estimate of Cost to the State for Implementation:** As required by AS 15.45.090(a)(4) the Alaska Department of Natural Resources has prepared the following statement of costs to the State of implementing the law proposed in the Initiative 07WTR3.
>
> **Statement of Costs and Revenues for initiative 07WTR3 Prepared by the Alaska Department of Natural Resources**
>
> This initiative appears to propose language that does not differ significantly from existing water quality standards. Therefore, the department does not foresee any significant impact on the department or on activities on state-

[101] *McAlpine v. University of Alaska*, 762 P.2d 81, 90 (Alaska 1988).
[102] All parties have requested a declaratory judgment that insertion of the term "adversely" is the correct interpretation of 07WTR3.
[103] *See Alaskans for Efficient Government*, 52 P.3d at 735

> owned land. As a result, there will not be significant fiscal impact—either revenues or costs---as a result of this initiative.[104]

The plaintiffs argue that the cost statement for 07WTR3 is defective because (1) it does not account for alleged takings claims against the State if the initiative passes and (2) it does not include the alleged loss in tax revenue if 07WTR3 is interpreted to be as restrictive as 07WATR. Neither argument has merit. First, as discussed above, the takings issue is not appropriate for the court to decide before the election, and therefore, the potential cost is not appropriate.[105] Second, the plaintiffs argue that the cost statement for 07WTR3 should be the same as the one for 07WATR, because the plaintiffs contend that both initiatives would ban large-scale metallic mineral mining. This argument arises from their assertion that the term "adversely" should not have been used in the summary. However, since the court has found that "adversely" is appropriate in the summary, then the plaintiffs' argument for a cost statement like the one for 07WATR must be rejected.

If the initiative passes, new regulations probably will be promulgated to implement it. For many pollutants, the regulations may be little different than current water quality standards. This suggests that the state would incur few additional costs to implement the program and mining companies would be able to obtain the necessary permits to operate.

The court concludes that the cost statement for 07WTR3 is impartial and accurate to enable voters to make an informed decision.

Conclusion and Order

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[104] CAP Mtn. Sum. J., Exh. 9 (07WTR3 Statement of Costs).
[105] *See Anchorage Citizens for Taxi Reform*, 151 P.3d at 421.

This court concludes that the lieutenant governor's decision was correct for both 07WATR and 07WTR3. Lieutenant Governor Parnell was correct in refusing to certify 07WATR because it is an appropriation. The lieutenant governor's certification of 07WTR3 as a regulatory measure was correct. The court concludes that 07WATR constitutes an appropriation, but 07WTR3 is not an appropriation, but merely regulatory. The State's summary of 07WTR3 using the term "adversely," as in adversely affect human health and the salmon life cycle, is appropriate to convey the obvious intent of the initiative. This court's decision makes it unnecessary to address parties' other arguments.[106]

With respect to 07WATR, the plaintiffs' motions for summary judgment and the State's cross-motion regarding 07WATR are GRANTED. The Sponsors' cross-motion regarding 07WATR is DENIED.

With respect to 07WTR3, the plaintiffs' motions for summary judgment are DENIED, and the State's and Sponsors' cross-motions regarding 07WTR3 are GRANTED.

IT IS SO ORDERED.

Dated this 28th day of February, 2008, at Fairbanks, Alaska.

Douglas L. Blankenship
Superior Court Judge

[106] Additionally, the plaintiffs' argument that 07WTR3 would change the constitution has no merit.